



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT ELDORET
ELC NO. 459 OF 2013

ELKANA KIBINGOR.....PLAINTIFF

VERSUS

CHARLES KIPKOECH TALLAM.....1ST DEFENDANT

KIPNGOR ARAP TALLAM.....2ND DEFENDANT

GIDEON KIPKOGEI CHEPSOM (sued as representative of the estate of

KIPCHOLIO CHEPSOM).....3RD DEFENDANT

JOHN KIPCHUMBA TALLAM (sued as representative of the estate of

KIPRONO SAMOEI TALLAM).....4TH DEFENDANT

KIPKEMOI MARINOI & TESSY MARINOI

(Sued as representatives estate of

KIPTIM ARAP MARINOI).....5TH DEFENDANT

JUDGMENT

By an originating Summons dated 19th September 2013 and amended on 30th June 2017 the plaintiff who claims to be the sole owner of the whole property known as L.R. NO. 498/121 situate in Eldama Ravine Town measuring 0.0777 Ha sued the defendants herein seeking for the determination of the following questions:

- 1) Whether the defendant should account for the rent proceeds and mesne profits from the commercial exploitation of the suit property.
- 2) Whether the plaintiff is entitled to accrued rent and or mesne profits from the commercial exploitation of the suit land.
- 3) Whether the defendants have been holding the suit property in trust for Elkana Kibingor.
- 4) In the alternative to 3 above, whether the contributions by the defendants to the improvement of the suit land amounts to registrable interest.
- 5) Whether the defendants should be compelled to pay costs of the suit

This suit commenced by an originating summons following the decision of the Koibatek District Land Dispute Tribunal No. 2 of 2008 delivered on 29th August 2008 and adopted on 14th May 2012 by the Resident Magistrate's Court at Eldama Ravine. The Originating Summons dated 19th September 2013 was later amended to incorporate the administrators of the estates of the 3rd to 5th Defendants.

Plaintiff's Case

The Plaintiff gave evidence and stated that he purchased L.R No 498/121 from an Asian called Daiyabai in 1965. He stated that he gave transfer documents which he instructed Charles Tallam the 1st defendant herein to do the registration on his behalf. It was PW1's testimony that he later on invited his brother in law who is the 1st defendant to join him in the maize business but they later fell out.

PW1 further stated that the 1st defendant fraudulently registered the property in his name and that of his brothers Kiptim Arap Marinoi, Kipchollio Chepsom, Kipng'ok Tallam and Kiprono Samoei Tallam. The plaintiff adopted his supporting affidavit as part of his evidence in chief.

It was the plaintiff's case that the 1st defendant stated that they bought the property together with his friends namely Elkana Kibingor, Marinai Wilson Kiptim, Kipngok Tallam, Kipchollio Chesom, Kiprono Samoei and Kipkoech Kiptallam but the 1st defendant later recanted his statement when cross examined on why the plaintiff's name was missing in the title yet he had contributed to the purchase of the property. He maintained that Elkana Kibingor never gave any money and only five people gave money.

PW1 stated that on cross examination, the 1st defendant stated that he never discussed with Mr. Patel on the sale of the property but it was his brother Kipngok who went together with the plaintiff to negotiate the purchase of the property. Further that the 1st defendant also denied ever receiving the title from PW1 and instead stated that he received the title deed from Mr. Patel.

On cross examination why the property was registered in his name first, he stated that the other business partners allowed him to register the property in his name because he was young and energetic.

The plaintiff stated that he filed a complaint with the elders who came to a conclusion that he had been unlawfully excluded from the management of the property and enjoying the profits from the use of the property which decision was adopted by the Resident Magistrates' Court at Eldama Ravine but the defendants refused to comply with the court order.

PW1 also stated that the defendants did not appeal the decision of the Tribunal pursuant to section 8 of the Land Dispute Tribunal Act but chose to move by way of Judicial Review which was dismissed for want of prosecution.

He therefore urged the court to grant the orders as prayed in the originating Summons.

Defence Case

The 1st defendant gave evidence and stated that the plaintiff is his brother in law whom they did with business from 1963 to 1964. It was his evidence that they had a shop but they never bought a plot together with the plaintiff. He further stated that they bought the suit plot from an Asian together with 5 other people and not the plaintiff. It was further his evidence that he was registered as an owner in 1973 and that they did not remit any money to the plaintiff.

DW1 further stated that the plot was transferred to him because he was younger and that the same was later transferred in the name of the 5 defendants in 1976. He also stated that they went to the tribunal and were asked to go and agree but he refused. He stated that 3 people are receiving rent apart from the plaintiff who has never received any amount.

On cross examination by Counsel for the plaintiff DW1 stated that they contributed money and bought the suit plot for a consideration of Kshs. 7200/ from an Asian vendor known as Patel. He admitted that it is the plaintiff who started the maize selling business and called him to come and help him. It was also his testimony that they paid the purchase price with the supply of maize and not cash.

DW2 on the other hand stated that only the 5 members whose names are in the title contributed towards purchase of the property. Contrary to his statement at the tribunal he maintained that Mr. Elkana Kibingor the plaintiff herein never contributed towards acquisition of the suit property.

The other defendants who were substituted did not know much about the transaction as it was done by their deceased fathers. They however stated that their parents were owners of the suit land as they are registered in the title. DW3 and DW4 stated that they get Kshs. 4000/ and 2000/ per month from the suit plot respectively.

They therefore urged the court to dismiss the plaintiff's claim with costs. Counsel agreed to file written submissions on behalf of their respective clients

Plaintiff's Submission

Counsel for the plaintiff submitted that the Tribunal in its conclusion made the following observation at page 15:

- a) Elkana Kibingor was kind enough to invite his relatives and friends into his company/business.
- b) Kibingor has to be included in the ownership of the company.
- c) He has all the right to receive the company shares (rent) etc.
- d) Kibingor should be rejoined to the company unconditionally

- e) He should get dividends as any other member of the company
- f) Mr. Kibingor must be reinstated into the business harmoniously and they should live as friends.
- g) That they should organize a meeting of all shareholders and elect a chairman and treasurer.
- h) Appoint a caretaker and appoint an auditor to audit the assets of the company plots, buildings/premises and finances.

The parties were given a right of appeal.

Counsel submitted that the suit herein was triggered by the defendants' refusal to organize a meeting of all the shareholders to elect a Chairman, Secretary and Treasurer and to appoint a caretaker and an auditor to audit the assets of the company. It was further Counsel's submission that by the time the Judicial Review Application No. 30 of 2008 was being determined, the Land Disputes Tribunal had ceased to exist and by dint of Section 13 of the Environment and Land Court Act, the court has jurisdiction to enforce the award of the Tribunal.

Mr. Odhiambo Counsel for the plaintiff submitted that the plaintiff filed the current Originating Summons for purposes of enforcing the award that was adopted as the judgment of the court. Counsel also submitted that the Land Disputes Tribunal did not make orders in terms of ownership of the suit land as it would have exceeded its jurisdiction under section 3 of the Repealed Land Dispute Tribunal Act.

Counsel listed the following issues for determination by the court:

- a) Whether the Plaintiff's claim is time barred.
- b) Whether the Plaintiff has any interest in the suit land.
- c) Whether the Plaintiff is entitled to accrued rent and mesne profits from the commercial exploitation of the suit land.
- d) Who should pay costs.

On the issue as to whether the Plaintiff's claim is time barred, Counsel submitted that although the Plaintiff only moved the Land Disputes Tribunal in 2008, the defendants submitted to the jurisdiction of the tribunal and have not anywhere in their pleadings challenged the jurisdiction of the tribunal to hear and determine the dispute. That the defendants after the decision of the tribunal had the option of appealing against the decision of the tribunal pursuant to S.8 of the repealed Land Disputes Tribunal which option they did not exercise. Counsel cited the provisions of section 8 which states that :

S. 8(1) states;

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 constituted for the Province in which the land which is the subject matter of the dispute is situated.

It was Counsel's submission that the defendants chose to move by way of judicial review as opposed to an Appeal which was dismissed for want of prosecution.

The Plaintiff's Counsel submitted that the defendants acquiesced the decision of the tribunal and abandoned lawful means of impeaching the award and the decision of the tribunal crystallized by the adoption into a valid judgment in terms of section 7(2) of the award and are bound by it and cannot raise the issue of limitation now.

Counsel cited the Court of Appeal decision in **Florence Nyaboke Machani v Mogere Amos Ombui & 2 others [2014] eKLR** which approved the reasoning of the High Court as follows;

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

It was therefore Counsel's submission that the proceedings of the tribunal became a judgment of the court and that the same is not available for impeachment by a claim of limitation of actions. Counsel Cited the provisions of Section 36 of the Limitation of Actions Act which states that :

Nothing in this Act affects any equitable jurisdiction to refuse relief on the grounds of acquiescence or otherwise.

Section 39 further states;

(1) A period of limitation does not run if—

(a) there is contract not to plead limitation; or (b) that the person attempting to plead limitation is estopped from so doing.

(2) For the purposes of subsection (1) of this section, "estopped" includes estopped by equitable or promissory estoppel.

Halsbury Laws of England defines acquiescence as

"The term is, however, properly used where a person having a right, and seeing another person about to commit or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed; a person so standing by cannot afterwards be heard to complain of the act."

Mr. Odhiambo also relied on the case of **WACHIRA WEHEIRE v ATTORNEY-GENERAL [2010] eKLR** where the High Court interpreted the act of appearing before a magistrate taking plea and thereafter appealing against the decision instead of challenging the constitutionality of the decision either before the magistrate or through a petition as acquiescence in the following terms;

We concur with the defendant's submission that the plaintiff relinquished his rights by submitting to a plea of guilty and further acquiesced in the Chief Magistrate's decision by appealing from that decision instead of challenging the constitutionality of the proceedings. We therefore find no substance in the plaintiff's allegation that his constitutional rights under Section 77 were breached either in the Chief Magistrate's Court or in the High Court during the hearing of his criminal appeal.

Counsel therefore stated that the defendants having participated in the tribunal proceedings and failing to raise the issue of limitation of action during the proceedings or even filing for judicial review or appeal on the ground of limitation, they are now estopped by law from raising the same when the Plaintiff is seeking to enforce the findings of the Tribunal.

Mr. Odhiambo also submitted that the Plaintiff is raising an issue of trusts in prayer no.3 of the originating summons whether the Defendants have been holding the suit property in trust for the plaintiff. He stated that it is trite law that the law on Limitation of Actions does not apply to extinguish a claim by a beneficiary of a trust from the trustee. He therefore urged the court to find that there existed a trust; Section 20 of the Limitation of Actions Act would apply.

Counsel further relied on the Court of Appeal case in **Stephens & 6 others v Stephens & another [1987] eKLR** where the court stated thus :

'The philosophy underlying the English Limitation Act seems to be, that where confidence is reposed and abused, a defaulting fiduciary in possession of trust property or which he converted to his use, should not be shielded by time bar. So no plea of limitation is available to a fiduciary in such a case. (See section 19 (1) of the Limitation Act 1939). The Parliament of Kenya clearly shares that policy and in the Limitation of Actions Act (cap 22) enacted a similar provision in almost identical language. Section 20(1)(b) of the Limitation of Actions Act (cap 22) provides that:

"None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust which is an action:

"to recover from the trustee, trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use."

That was precisely the reliefs which the appellants sought in regard to the suit plot. In my opinion, no period of limitation applies in this case and I am in respectful disagreement with the learned judge's contrary holding on this point. If this is the right view to take, the same must hold good for the consequential relief of account.'

Counsel therefore submitted that time bar through Limitation of Actions is inapplicable due to the issue of trusts.

On the 2nd issue as to **whether the Plaintiff has an interest in the suit property**, Counsel submitted that the Plaintiff has an interest in the suit land as a purchaser as was noted by the Land Disputes Tribunal in their finding stating that ;

And founder members name was excluded Mr. Elkana Kibingor. That when Mr. E. Kibingor's name was excluded from the business plot he was bitter and they opted to buy him a plot elsewhere which he refused (Kibingor) bitterly because he was the rightful owner of the plot LR. NO. 498/121.'

It was therefore his submission that this finding of fact was never challenged by the defendants by dint of Section 8(1) of the Land Disputes Tribunal. It therefore crystallized into a judgment by the adoption of the award of the Land Disputes Tribunal and therefore the defendants are estopped from disputing the factual findings of the tribunal.

Counsel relied on the Court of Appeal case of **Chege Macharia v Francis Kimani Kirimira [2015] eKLR** stated;

'Once the tribunal heard a dispute and made a determination that was the end of the matter on the merits and all that remained was adoption by the Magistrates' Court. That much is clear from a plain reading of Section 7(2) of the repealed Act. It has also been the subject of many judicial pronouncements to the effect that a Magistrate is under a statutory compulsion to enter judgment in terms of the

award once he receives it from the chairman of the tribunal. It not being open to him to alter, amend, question or set it aside, See, MUTEMI MWASYA -VSMUTUA KASUVA MACHOKOS HC.C.A. 140 of 2001 CHRISPUS MICHI GAKU -VS- KARANJA WAINAINA [20061 eKLR and PETER OUMA MITAI VS- JOHN NYARARA KISII HCCCA 297 of 2005. so long as the court was satisfied that an award was on the face of it issued by a proper Tribunal and not a nullity, it was under duty to adopt it’.

Mr. Odhiambo therefore submitted that they have a right to interrogate the evidence before the tribunal as permitted by S.34 of the Evidence Act and the doctrine of estoppel established above and the evidence before the court to arrive in the above conclusion and that the same was also adopted in the plaintiff’s supporting affidavit which he relied on.

On the issue of jurisdiction Counsel submitted that Section 13 of the Environment and Land Court Act vests the court with jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution. Article 162(2)(b) of the Constitution states that Parliament shall establish special courts to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. On the other hand the Land Disputes Tribunal Act, Cap 304A limits the tribunal’s jurisdiction to exclude a determination of ownership.

Counsel cited the Court of Appeal case in Mutiso v Mutiso [1988] eKLR adopted the implication of a resulting trust as was decreed by the English Court of Appeal in Hodgson v Marks [1971] Ch 892 and the court stated as follows;

Mrs Hodgson therefore had an overriding interest in possession. It seems to me that the above decision is of great guidance in the instant case. Even if a gift is indicated, it may still be that the beneficial ownership is intended to remain in the person making the gift. Secondly, even if the learned judge were right that there was no agreement that the appellant would re-transfer the farm to the respondent when the latter came out of prison and therefore the express trust failed at this stage, nevertheless the resulting trust may still arise.

Further that the High Court in N W K v J K M & another [20131 eKLR adopted the English position in Halsbury’s Laws of England, Fifth Edition , Volume 72 at paragraph 280 as follows:

“Subject to any express declaration of trust, where property is purchased in one party’s name but both parties contribute to the purchase price, the other party acquires an interest under a resulting trust proportionate to his or her contribution to the purchase price, or alternatively may make a claim under a constructive trust. On such a claim the first and fundamental question which must always be resolved in whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement or understanding reached between them that the property is to be shared beneficially. This common intention, which has been said to mean a shared intention communicated between them and which must relate to the beneficial ownership of the property can only be based on evidence of express discussion between the parties, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made, it will only be necessary for the party asserting a claim to a beneficial interest against the party entitled to the legal estate to show that he or she had acted to his or her detriment or significantly altered or her position in reliance on the agreement in order to give rise to a constructive trust or proprietary estoppels.”

Closer home in Twalib Hatayan & another v Said Sa gar Ahmed Al-Heidy & 5 others [20151 eKLR the Court of Appeal stated thus of resulting trusts;

This leaves us with resulting trusts; upon which the appellants had laid their claim. A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee (see Black’s Law Dictionary) (supra). This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell’s Equity 29th Edn, Sweet & Maxwell p. 175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor’s intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see. Snell’s Equity at p.177) (supra).

It was Counsel’s submission that the evidence that the Plaintiff met the original owner Mr. Patel and negotiated to purchase the land through payment of maize in instalments is uncontroverted. The Plaintiff then invited the defendants to continue with the company business in the suit property. There was no intention by the Plaintiff at any one point to transfer the suit property to the defendants.

The Court of Appeal in Mutiso v Mutiso supra observed thus;

‘There is the general consideration that the result reached must be fair. Two factors sometimes arise which may have an indeterminate effect, but which in proper circumstances may be taken into consideration. They are the degree that the donee took part in the negotiations for the transfer, and the effect on other parties. In this case the appellant knew very well that the respondent would only transfer the farm for its management. His attempts to find other solutions, and his final agreement showed the appellant that it was not a settlement on her out light, but to save the farm until the respondent came out of prison. It was a temporary measure.’

‘Secondly, no one was deceived by the arrangement. The wife carried out the arrangement. In all the circumstances it is fair to imply a resulting trust. The only said aspect is that the parties have parted company. But no doubt provision will be made for them in the ensuing proceedings.’

That the only result that would be fair is to declare that the defendants held the suit property in trust for the Plaintiff.

On the 3rd issue as to **whether the Plaintiff is entitled to accrued rent and mesne profits from the commercial exploitation of the suit land**, Counsel submitted that

Section 2 of the Civil Procedure defines "mesne profits" as;

in relation to property, means those profits which the person in wrongful possession

of such property actually received or might with ordinary diligence have received there from, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession

Order 21 rule 13 of the Civil Procedure Rules states;

13. Decree for possession and mesne profits [Order 21, rule 13.1

(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree— (a) for the possession of the property;

(b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;

(c) directing an inquiry as to rent or mesne profits from the institution of such suit until —

(i) the delivery of possession to the decree-holder;

(ii) the relinquishment of possession by the judgment- debtor with notice to the decree-holder through the court; or

(iii) the expiration of three years from the date of the decree, whichever event first occurs.

(iv) buildings/premises

(v) Finance

9. Any party aggrieved or dissatisfied has a right of appeal within 30 days.

Counsel submitted that since the defendant did not appeal the award which was adopted as a judgment of the court, the award must now be enforced by the court and accrued profits and or mesne profits be granted in favour of the Plaintiff. That the defendants are on record admitting that the suit property has been generating commercial rent. The defendants have locked out the Plaintiff from the benefit of the commercial rents. The Tribunal ordered audit of the assets of the company.

In conclusion Counsel submitted that the court has the jurisdiction to declare a resulting trust in favour of the Plaintiff and restitute the property to the Plaintiff as per the tribunal finding.

The Plaintiff filed further submissions in response to the defendant's submissions. It was Counsel's submission that

the issue of the originating summons having not been signed is an issue of form that ought not to defeat the claim by the Plaintiff. Further that the Plaintiff filed an amended Originating Summons which clearly bears the signature of the Plaintiff's Advocate as required by Order 2 rule 6.

On the 2nd issue as to suit against the estate of deceased Counsel submitted that defendants in this suit were not willing to take out letters of administration to defeat the claim by the Plaintiff. Counsel stated that the Law of Succession Act envisages such a situation.

Counsel cited the Court of Appeal case of Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased) [2016] eKLR where it observed;

'In this discussion, I will deal with two forms which are material to the matter before me. One form is the one commonly known as Limited Grant of Letters of Administration Ad Litem which is provided for under Form 14 of the Fifth Schedule of the Act and deals with suits. The said provision states as follows:-

'when it is necessary that the representation of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution'.

From the foregoing, it is clear that a Limited Grant of Letters of Administration Ad Litem is usually used when the estate of a deceased person is required to be represented in court proceedings. (See the case of Greenway vs. Mc Kay (1911) 12 CLR 310).'

Counsel submitted that it was necessary that the estate of the deceased be represented and order to that effect was made.

On the issue that the claim is res judicata, Counsel submitted that the repealed Land Disputes Tribunal Act never conferred jurisdiction to determine ownership of registered land to the tribunal and that the tribunal never awarded the Plaintiff any portion of the suit lands other than orders in so far as use of the said land was concerned. That to date the same defendants who have refused to execute the decision of the tribunal seek to benefit from their own wrong to avoid ownership of the suit property from being determined.

Counsel cited the case of **Geoffrey Nganga Njuriba v Attorney General & another [2016] eKLR** where Gitumbi J. observed;

This decision falls on all fours to the present suit. It is my finding that the Land Disputes Tribunal in Githunguri was not a "competent court" for purposes of determining the issue of the ownership of the suit property which issue has been presented to this court for determination. That being the position, the defence of res judicata is not available in the circumstances and the Preliminary Objection raised by the 2nd Defendant is hereby dismissed. Costs in the cause.

Further in the case of **Bernard Mugo Ndegwa v James Nderitu Githae & 2 others [2010] eKLR** Justice Karanja made emphasis on competence in the following terms;

This plaint also raises the issue of fraud which particulars the plaintiff has particularized. Was this an issue that the Land Disputes Tribunal was competent to try? I find not. In my considered view we cannot say that the issues of fraud or specific performance were either raised and determined or ought to have been raised and determined before the Land Disputes Tribunal in order to make this suit Res Judicata. Briefly put, the Land Disputes Tribunal was not a competent court as envisaged in Section 7 of the Civil Procedure Act. This suit is therefore not Res Judicata and the same is properly before this court and it should proceed to hearing

Counsel therefore submitted that the court has the competence to try the matters in the amended originating Summons.

DEFENDANTS' SUBMISSIONS

Counsel reiterated the evidence of the parties and listed the following issues for determination

- a) Whether the suit is fatally defective.
- b) Whether the suit is statutorily time barred
- c) Whether the suit is res judicata
- d) Whether the prayers sought are capable of being granted.
- e) Whether the Plaintiff Purchased the suit land vi) Whether the Plaintiff should be paid mesne profit

On the 1st issue as to whether the suit is fatally defective, Counsel submitted that the Originating Summons dated 9th September 2013 is fatally defective as it was not signed and as failure to sign pleadings is a cardinal violation of the rules of pleadings. This is in breach of Order 2 Rule 1 6 of the civil Procedure Rules Cap 21 Laws of Kenya. He stated that the wording in the said provision is couched in mandatory terms.

Counsel submitted that pleadings are legal documents and can only be valid if it is drawn by a competent person. That the court has one statutory duty in the circumstance, which is to uphold the rule of law by dismissing this Originating Summons on the basis that the same is not signed.

Counsel further submitted that as at the time of filing the Originating Summons on 1st October 2013, the Plaintiff knew that the 3rd 4th and 5th defendants were deceased and no administrators had been appointed. Counsel therefore submitted that the pleadings were in contravention of Order 1 Rule I & 4 Order 4 Rule 4 & 5 of the Civil Procedure Rules Cap 21 laws of Kenya which provides that a party sued should be able to answer to the claim against them.

Mr. Kipnyekwei Counsel for the defendants submitted that the substitution proceedings by the plaintiff was an abuse of the due process of law because a litigant cannot sue a deceased whose estate has no administrator, commence citation proceedings to compel a deceased's heir to act as the deceased's administrator and then purport to substitute the dead party with the administrator who had not been appointed as such before the suit was filed. Further that substitution proceedings applies only in situations where a party sues or is sued but dies during the pendency of the suit. Counsel therefore urged the court to strike out the suit.

On the issue as to whether the suit is statutorily time barred, Counsel submitted that Section 7 of the Limitation of Action Act Cap 22 Laws of Kenya provides that a claim for any interest in land shall be filed within a period of 12 years from date of cause of action. He stated that the cause of action in this case arose in 1965 and that the plaintiff discovered 1966 that the 1st Defendant had allegedly transferred the suit land in his favour in a fraudulent manner. It was therefore Counsel's submission that the Plaintiff did not assert his right to the suit land within the prescribed time.

On the issue whether the defendants held the suit land in trust for the plaintiff, Counsel submitted that the evidence adduced by the Plaintiff and the defendant(s) do not allude even in the remote sense that there was a trust relationship in the manner parties dealt with the acquisition and running of the business within the suit land Counsel submitted that the only point at which the Plaintiff and the defendants may have operated in trust was while the joint business venture subsisted which was for a period of 3 years.

Mr. Kipnyekwei submitted that the Plaintiff never lodged any criminal complaint at the Police station for fraud. He also never moved the court or any other forum, seeking the revocation of registration of title in the name of the 1st defendant/respondent. He stated that Section 9 of the limitation of Actions Act provides that an accrual of right of action in case of present interest in land arises on the date of dispossession or discontinuance of such right.

Further that Section 18 provides that when a right of action is barred under the Act even the right of a party claiming an interest under trust is extinguished and that the Plaintiff failed to take action within a period of 12 years and that his right was extinguished in 1978. That the trust relationship pre-supposes that there must have been a meeting of minds at the point of purchase of the property in issue.

Counsel submitted that the plaintiff has failed to demonstrate that on learning that Mr. Patel was offering the suit land for sale, all the parties herein sat, agreed and contributed money to purchase the same.

On the issues as to whether this suit is res judicata Counsel submitted that in the proceedings at the Land Disputes Tribunal, the Plaintiff sued the 1st defendant claiming the suit land whereby he claimed that he solely purchased the suit land. That further he claimed that he discovered that the 1st defendant had registered himself as the owner of the suit land parcel L/R 498/121 thereby keeping him out ownership of the suit land.

Further that the decision of the tribunal was that the Plaintiff be included as a co-owner of the company and that he is entitled to shares in the Company assets including plots, buildings and finance which was adopted as the judgment of the court 29th July 2008.

Counsel also stated that the 1st defendant having not been satisfied with the courts order on the award filed Nakuru High Court -Judicial Review Case No. 30 of 2008 which was dismissed for want of prosecution. Mr. Kipnyekwei submitted that the status of the claim is that the award was adopted by the Magistrate's court as a judgment on ownership of the suit land and the same has not been set aside. Counsel urged the court to find that the suit is res judicata.

On the issue as to whether the prayers sought can be granted, Counsel submitted that the prayers sought cannot be granted because the issues were fully addressed in the Land Disputes Tribunal. He therefore urged the court to dismiss the plaintiff's case.

Analysis and determination

This is a matter which started with the plaintiff suing the defendants whereby the 3rd 4th and 5th defendants were sued as estates of the deceased persons. The court observed when the matter came up for directions on 30th July 2014 that 3 of the respondents had been described as the estate. The court posed a question as to who were the administrators of these estates.

Counsel for the plaintiff responded by submitting that appearances had been filed in respect of the respondents as they served the family members. The court stated thus that the respondents may have been improperly sued. The court gave Counsel time to think about their positions and stated that if the court does not receive satisfactory answers especially on the parties described as estates then the court would strike out the entire suit or the said parties.

It is on record that the plaintiff later made an application for substitution of the defendants described as estates after getting limited grant of letters of administration ad litem.

The issues for determination in this suit are as to whether this is the right court for the enforcement of the orders that were awarded by the Land Disputes Tribunal and adopted by the Eldama Ravine Magistrates Court, whether this suit is res judicata and whether the plaintiff is entitled to the orders sought.

I will first of all deal with the issues raised by Counsel for the defendants on the unsigned pleadings. The plaintiff filed an originating summons vide his Advocate which was unsigned but was later sanitized by an amended one which was signed. I therefore hold that the issue was rectified and the same met the threshold that pleadings must be signed.

The next issue is the startling one where the plaintiff decided to sue estates of deceased persons. This was picked by the Judge as an anomaly which should not have happened. The worst that could have happened was the striking out of the respondents described as estates of deceased persons and there were two respondents who were properly sued. Therefore the suit would have remained against the 1st and 2nd respondents.

I will start with the issue as to whether **this suit is res judicata**.

The doctrine of res judicata is provided for under Section 7 of the Civil Procedure Act which provides as follows:-

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

The Court of Appeal stated in the case of **John Florence Maritime Services Limited & Ano. Vs Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) e KLR** in which it cited verbatim the following paragraph in **Henderson Vs Henderson (1843) 67 ER 313**.

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

The rationale behind res judicata was outlined in the above case as follows:-

“.the rationale behind res judicata is based on the public interest that there should be an end to litigation over the same matter. Res judicata ensures the economic use of the court’s limited resources and timely termination of cases. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law.”

The questions that the plaintiff wants the court to determine in this case are similar to the award at the Land Disputes Tribunal which was adopted as a judgment of the court. The tribunal observed as follows:

- a) Elkana Kibingor was kind enough to invite his relatives and friends into his company/business.
- b) Kibingor has to be included in the ownership of the company.
- c) He has all the right to receive the company shares (rent) etc.
- d) Kibingor should be rejoined to the company unconditionally
- e) He should get dividends as any other member of the company
- f) Mr. Kibingor must be reinstated into the business harmoniously and they should live as friends.
- g) That they should organize a meeting of all shareholders and elect a chairman and treasurer.
- h) Appoint a caretaker and appoint an auditor to audit the assets of the company plots, buildings/premises and finances.

The court adopted the award as it is and it became a judgment of the court which is valid and binding on the parties. The defendant filed a Judicial Review in respect of the award adopted as the judgment of the court but the same was dismissed for want of prosecution. The defendant had also filed for stay of execution in the Magistrates court which was lifted after the Judicial Review was dismissed in Nakuru High Court.

I find that the issues in this case were dealt with by a competent court and no appeal was preferred therefore the judgment is still valid. The attempt to bring other issues of trust and ownership which the plaintiff claims is a backdoor way of appealing against the judgment.

The second issue is as to whether this court has jurisdiction to enforce the award of the Land Disputes Tribunal which was subsequently adopted as the judgment of the court. Section 30 of the Environment & Land Court Act provides a transitional framework for all cases pending in the Land Disputes Tribunals. It provides as follows:-

“(1) All proceedings relating to the environment or to the use and occupation and title to land pending before any court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar.

(2), The Chief Justice may, after the court is established, refer part heard cases where appropriate, to the court.”

What is the legal status of decisions made by the Land Disputes Tribunals established under the repealed Land Disputes Act ? The answer to the above question is contained in Section 23(3) of the Interpretation and General Provisions Act (Cap 2) which provides as follows:-

“Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not-

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law repealed; or

(c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or

(d) affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or

(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.

Section 23(3) (e) of the Interpretation and General Provisions Act preserves and protects decisions and awards made by the defunct Land Disputes Tribunals. Similarly, it preserves and protects judgments adopted and pronounced by Magistrates' Courts within the framework of the repealed Land Disputes Act. They remain valid judgments of the courts. The resultant decrees remain valid binding instruments capable of execution.

Would it be proper for the plaintiff to seek for enforcement of a judgment that was delivered in the Magistrates court in the High court? The best place to enforce the judgment is the court that delivered the judgment as it still has jurisdiction to do so.

I am guided by the Court of Appeal case of **Florence Nyaboke Machani Vs Mogere Amosi Ombui & 2 Others (2014) eKLR**. In this particular Appeal, a party who was aggrieved by a verdict of the Borabu Land Disputes Tribunal did not challenge the decision of the Tribunal in accordance with the procedure set out in the repealed Act. Neither were judicial review proceedings taken to quash the award. He instead chose to file suit for declaratory orders and compensation. The Court of Appeal entirely agreed with the trial Judge's decision to dismiss the suit. The Court of Appeal endorsed the following legal reasoning by Makhanda J (as he then was)

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

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

I subscribe to the above on the issue of a valid judgment which has not been set aside. The judicial review that was filed by the defendant was the way to go to challenge the adopted judgment but unfortunately the same was dismissed for want of prosecution which application was filed by the plaintiff herein. From the judicial review proceedings it is evident that the plaintiff stated in his grounds that the first meeting in execution of the order dated 29th July 2008 was scheduled for 12th September 2012 which meeting stood threatened by virtue of the stay orders. This shows that the plaintiff was in the process of executing the order but was derailed by the stay order. The plaintiff therefore cannot file another case for the same orders to be enforced by a court that did not issue them.

Having said that I will not go into the other issues as to whether the suit is time barred or not as my task is over with the finding that this

court does not have jurisdiction to enforce the orders that had been granted by the Magistrate's Court. The best the plaintiff can do is to go back to the Magistrates Court to enforce such orders as the stay orders had already been lifted by the ruling of the High Court in 2013.

Section 7(2) of the Land Disputes Tribunal Act, 1990 (repealed by the Land Act, 2012), provides that:

“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.”

Further Section 34(1) of the Civil Procedure Act Cap 21 Laws of Kenya provides for execution of decrees as follows:

"All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit. "

On the issue of costs I will order that each party to bear their own costs as the defendants have also not complied with the orders of the lower court.

Dated and delivered at Eldoret this 6th February, 2019

M.A ODENY

JUDGE

JUDGMENT Read in open court in the presence of Mr.Siboe for Plaintiff and Mr.Tororei holding brief for Mr.Kipnyekwei for defendants.