



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 26 of 2017

DUNCAN KAMAU KINGORA.....PLAINTIFF

VERSUS

NIMROD IRUNGU GATAMBIA.....1ST DEFENDANT

LAND DISTRICT TRIBUNAL, KAHURO

DIVISION.....2ND DEFENDANT

PRINCIPAL MAGISTRATE'S COURT

MURANG'A.....3RD DEFENDANT

THE HONOURABLE ATTORNEY

GENERAL.....4TH DEFENDANT

JUDGEMENT

1. The Plaintiff and the 1st Defendant are relatives. The 1st Defendant is the nephew of the Plaintiff.
2. By a plaint dated the 31/3/2009 the Plaintiff sought the following orders;
 - (a) A declaration that the findings of Land Dispute Tribunal case No.39/2008 are ultra vires its powers hence ought to be nullified.
 - (b) A declaration that the 3rd Defendant's decision to adopt findings of the Land Dispute Tribunal was ultravires.
 - (c) A permanent injunction to restrain interference with LR Loc. 8/KAGAA /611
 - (d) Costs of the suit
3. The Plaintiffs cause of action arises out of the decision made on the 23/5/2008 in LDT 309 of 2008 where the tribunal directed that all that piece of land registered and known as LOC 8/KAGAA/611 then registered in the name of the Plaintiff (hereinafter referred to as the suit land) be divided into two portions and shared equally between the family of Nyambura Kingora and Wambui Kingora. The said order was adopted by the 3rd Defendant on 23/5/08.
4. Upon being served with the plaint the 1st Defendant by a Written Statement of defence dated 10/7/09 denied the Plaintiffs claim and asserted that the 3rd Defendant's adoption of the judgment of the Land Dispute DT was valid in that the Plaintiff did not appeal or have the said judgment set aside. The 1st Defendant added that acting on the faith of the said judgment he caused the suit land to be subdivided into two equal plots namely LOC 8/KAGAA/1223 and 1224 registered in the names of the Plaintiff and the 1st Defendant respectively. The 1st Defendant further stated that the subdivisions allocated to him that is to say LOC 8/KAGAA/ 1224 was further subdivided into 7 plots and allocated to the beneficiaries in his family lineage as plot Numbers LOC 8/KAGAA/1406-1412.
5. The 2nd, 3rd and 4th Defendants entered appearance in the suit and do not appear to have field any defence to the Plaintiffs claim. They also did not appear at the hearing of the suit although they had been duly served.

Evidence of the Plaintiff

6. PW1 – Duncan Kamau Kingora adopted his Written Statement dated the 17/5/18 as his evidence in chief. Further he added that he was the registered owner of LOC 8/KAGAA/611 from 1960 to 12/3/2008 when vide a judgement issued by the 3rd Defendant the title was subdivided into two portions LOC 8/KAGAA/1223 and LOC 8/KAGAA/1224 to be shared equally between the wives of Kingora; Nyambura Kingora and Wambui Kingora. He stated that the land belonged to him and was never clan land. That he bought the land between 1949 – 1958 and that he took care of the family of the 1st Defendant because he wanted his extended family to have the best in life. He averred that upon the death of the 1st Defendant's sister Faith Wanjiru, the family requested him for a burial site on the suit land. That this is testament that the land belonged to him and not clan land as alleged by the 1st Defendant. The witness was neither cross examined nor re-examined at the hearing.

7. PW2 – Manasses Karime Ndami gave evidence and stated that the Plaintiff is his step brother and the 1st Defendant is his nephew. The Plaintiff is the first born and only son in the family of Kingora. The father of the 1st Defendant was called Gathamia. Gathamia never claimed the land in his lifetime. He asserted that the land LOC 8/KAGAA/611 belonged to the Plaintiff having purchased fragments from various people and consolidated it into one parcel. He testified that the family of the 1st Defendant sought a burial site to bury their sister Faith Wanjiru from the Plaintiff and if indeed the land was the 1st Defendants there would have been no need to request for the burial site.

8. PW3- Macharia Ndegwa Muthemba testified and stated that both the Plaintiff and 1st Defendant are his relatives. He stated that he was present in the meeting that deliberated on the burial site of Faith Wanjiru on the land and that he witnessed the agreement. The request was made by Marion Njeri, the mother of the late Faith Wanjiru. He reiterated that the land belongs to the Plaintiff. He stated that after the decision of the tribunal the land was subdivided by the family of the 1st Defendant. In addition, he stated that he is 94 years and has been a neighbour of the Plaintiff since 1958. He informed the Court that the land belongs to the Plaintiff since demarcation. He averred that currently there are no occupants on the land but confirmed that the land parcel LOC 8/KAGAA /611 was subdivided into two portions. Neither the Plaintiff nor the Defendant live on the land.

9. PW4- Bernard Kamau Karime stated that he is related to the parties in the suit. He stated in 1958 the 1st Defendant's father was permitted to settle on the land when he came from the concentration camps but later asked to vacate and they did. The 1st Defendants' father and sister were buried on parcel LOC 8/KAGAA /611 but his mother was buried on the land currently being occupied by the 1st Defendant that is to say a separate piece of land. According to him he stated that the land belongs the Plaintiff. He informed the Court that one part of the land is in the hands of the 1st Defendant and his brothers while another is in the hands of the Plaintiff. He stated that the family of the 1st Defendant have their own lands elsewhere.

10. Nimrod Irungu Gatambia, the 1st Defendant testified and adopted his undated Written Statement but filed on the 29/5/18 as his evidence in chief.

11. Briefly, the witness informed the Court that his grandfather had two wives; Nyambura and Wambui. He had several lands and he and his wives died before independence and were buried on the land. The Plaintiff was the son of Wambui while the 1st Defendant was the grandson of Nyambura. That during the land demarcation and consolidation in 1959/60 the fragments were consolidated and registered under the name of the Plaintiff in trust for both houses as LOC8/KAGAA/611. That the land was clan land. He stated that they vacated the land around 2000 at the instigation of the Plaintiff. He stated that the Plaintiff was educated in the family and thus was entrusted with the land on behalf of the other family members. He then filed the case at the tribunal which gave an award on the 12/3/2008 which was adopted as an order of the Court on the 23/5/2008 that the land be subdivided into two equal parts between the house of Nyambura and Wambui. He stated that his family had other lands as well. That he does not live on the suit land. That her sister Faith was buried on the suit land. He informed the Court that no succession petition was filed in respect to the estate of the wives of Kingora. That by the time the orders of the Court were issued the old ladies were long dead.

12. The witness gave testimony that armed with the Court order he obtained the Land Control Board consent and consequently the title for parcel LOC 8/KAGAA /611 was subdivided into two portions; LOC 8/KAGAA /1223 and 1224 in the name of the 1st Defendant and Plaintiff respectively. He cited the various cases that were filed by the Plaintiff some of which have been struck out. He also informed the Court that parcel No LOC 8/KAGAA /1223 was further subdivided into parcels LOC 8/KAGAA /1406-1412.

13. After conclusion of the hearing the parties with directions from the Court filed Written Submissions on 21/11/18 in respect to their case. On 4/12/18 and 2/1/19 the Plaintiff and the 1st Defendant respectably filed their Written Submissions.

14. The Plaintiff submitted and reiterated the evidence of the case. He stated that the 2nd Defendant acted ultravires its powers and therefore its award was null and void. The adoption of the decisions of the 2nd Defendant was also null and void. Consequently, the subdivision of the land were nullities.

15. The Plaintiff wondered how the Plaintiff and the 1st Defendant became registered as owners of the two resultant subdivisions when the orders of the Land Dispute Tribunal decreed that the land be subdivided into two equal parts between the family of Nyambura and Wambui. That no evidence has been shown to the Court that letters of administration for the estates of the two ladies were obtained.

16. He relied on several case law where the Courts held that where the Land Dispute Tribunal exceeded jurisdiction, their proceedings and the adoption of the orders are a nullity.

17. The 1st Defendant submitted and faulted the 1st Defendant for failing to appeal the decision of the Land Dispute Tribunal within the time stipulated for appeal. That he also failed to file judicial Review proceedings to quash the decision of the Land Dispute Tribunal. That he

attempted to file Judicial Review proceedings vide Misc Application No 144 of 2008 but was struck out on the 2/2/2009. That bringing this suit late in the day is like filing an appeal indirectly.

18. He submitted that the Plaintiffs claim has been overtaken by events as the land parcel No LOC 8/KAGAA /611 has been subdivided into various plots in favour of the respective beneficiaries.

19. The Court has considered the pleadings, the proceedings, the evidence tendered during hearing and the submissions filed by the parties. The issues set out below fall for considerations by the Court, namely;

- a. Whether the findings of 2nd Defendant the Land Dispute Tribunal in case No 39 of 2008 are ultra vires.
- b. Whether the 3rd Defendant's adoption of the decision made by the 2nd Defendant is ultra vires.
- c. Whether the Plaintiff is entitled to a permanent injunction in respect of the suit land.
- d. Who should bear the costs of the suit?

The Court will proceed to determine the issues in their order as above.

Whether the findings of the 2nd Defendant in Land Dispute Tribunal in case No 39 of 2008 are ultra vires

20. The jurisdiction of the 2nd Defendant was conferred by the Land dispute Act Cap 18 of 1990. Section 3 of the said Act states as follows;

“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, shall be heard and determined by a Tribunal established under section 4”.

21. The said Act was nevertheless repealed in its entirety upon the enactment of the Environment and Land Court Act, No 19 of 2011 on 30/8/2011.

22. In the case of **Sir Ali Bin Salim VS. Shariff Mohamed Shatry Civil Appeal NO. 29 1940** it was stated that; -

“If a Court has no jurisdiction over the subject matter of the litigation, its judgments and orders however precisely certain and technically correct are mere nullities and not only voidable; they are void and have no effect either as estoppel or otherwise and may not only be set aside at any time by the Court in which they are rendered, but be declared void by every Court in which they may be presented. It is well established law that jurisdiction cannot be conferred on a Court by consent of parties and any waiver on their part cannot make up for the lack or defect of jurisdiction”.

23. In the case of **M' Muthuri Kameru M' Njogu vs Meru Central District Land Dispute Tribunal & Another [2003] Rawal J in 2003 held that .**

“The issue of jurisdiction of the Tribunal was brought to its attention by the subject- applicant. Despite that the Tribunal went ahead by hearing the matter and declaring who is the owner of the suit land. This action obviously is ultra vires. The power of the Tribunal vested under the Act. The decision of the Tribunal was over the dispute of the ownership of the land on allegation of impersonation and fraud. The dispute was apparently and indisputably outside the jurisdiction of the Tribunal. The proceedings before and the award of the Tribunal are thus null and void. Nothing further can stand on a matter which is a nullity. I need not state that the Tribunal is a quasi-judicial body and the proceedings taken and award issued by it being a nullity is amenable to the issuance of orders of certiorari. The award has affected the right of the subject-applicant and ought to be quashed.”

24. It is trite that a Court cannot determine a matter unless it has jurisdiction. Infact, jurisdiction is everything and without it the Court must down its tools. In the case of **The Owners of the Motor Vessel Lilian 'S' v Caltex Kenya Ltd (1989) KLR 1**. where it was held and quoted numerous times in several cases , that jurisdiction is everything and without it the Court has no power to make any further step and must down its tools.

25. In the instance case, the tribunal lacked statutory jurisdiction to determine the matters before it. Consequently, the award was a nullity and incapable of enforcement.

26. **Republic Vs Kajiado North District Ngong Land Disputes Tribunal, Senior Resident Magistrate Kadjiado**, where the Court held that:-

“If the said Tribunal had no jurisdiction to entertain the matter, whatever proceedings flowed from its decision would be null and void since decision made by a tribunal which has no jurisdiction to entertain the dispute before it must of necessity be null and void”. Land Disputes Tribunal had no jurisdiction to interfere with title to a registered land”.

27. The Plaintiff has urged that there was nothing to set aside, the Court cannot proceed to put something on nothing. The Plaintiffs' authorities are persuasive and the argument suffices .It is further opined that the effect of the award was that it was void *abinitio* and thus any

enforcement , would amount to putting something on nothing ,such orders are incurably bad and there would be no need for further orders to set it aside .

28. In **Macfoy vs. United Africa Co. Ltd [1961] 2 ALL ER 1169 at 1172** the Court held that;

“that where an act is a nullity it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so the actions taken in pursuance thereof must therefore break down once the superstructure upon which it is based is removed; since you cannot put something on nothing and expect it to stay there as it will collapse”.

29. In the present case, a title to the suit land was issued to the Plaintiff on the 4/3/60. Going by the proceedings before the impugned Land Dispute Tribunal, the decision made relates to ownership of land so much so that the tribunal ordered the suit land to be divided into two and shared amongst the two families belonging to the Plaintiff and the 1st Defendant. Guided by the above cases above it is clear that the tribunal acted beyond the power granted to it by then Land Dispute tribunal Act.

Whether the 3rd Defendant’s adoption of the decision made by the 2nd Defendant is ultra vires.

30. Section 7 of the Land Dispute Tribunal in so far as it relates to the conduct of the 3rd Defendant states as follows;

“(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 judgement in accordance with the decision of the Tribunal and upon judgement being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act”.

31. It is clear that the proceedings before the tribunal related to both title to land and to the beneficial interest to the suit land. Such a dispute is not in the Courts view within the provisions of section 3(1) of the Land Dispute Tribunal Act. By dint of section 159 of the Registered Land Act, such a dispute can be tried by the High Court or the Resident Magistrates Court in cases where the latter has pecuniary jurisdictions.

32. See **Jotham Amunavi Vs Chairman of Sabatia Divisional Land Dispute Tribunal and Another, Kisumu Civil Appeal (CA NO 256 OF 2002) CA observed** in that case the Land dispute tribunal acted in excess of jurisdiction when it purported to revoke the Plaintiffs title to the suit property. It went ahead to affirm that such power was reserved for the High Court vide section 159 of the Registered Land Act, Cap 300 Laws of Kenya (now repealed).

33. In the Courts finding in respect of this enactment the 3rd Defendants duty on the decisions of the 2nd Defendant was purely statutory. The law does not give the 3rd Defendant power to inquire into or review or vary the decision of the 2nd Defendant. It clearly directs the 3rd Defendant to adopt the decision of the 2nd Defendant without inquiry. However in this case it is the Courts finding that the decision having been made in excess of jurisdiction, there were no valid orders adopted by the Court. Nullities beget nullities. Section 7 of Land Dispute Tribunal Act envisaged an adoption of a lawful decision by the 3rd Defendant since the decision of the 2nd Defendant was a nullity for want of jurisdiction. There was nothing that the 3rd Defendant could base on the issue a valid and lawful decree.

34. The 1st Defendant has faulted the Plaintiff for not appealing the decision of the Land Dispute Tribunal aforesaid. The record shows that the Plaintiff filed Judicial Review No. 144 of 2008 which sought orders of certiorari to quash a decision by the Land Dispute Tribunal. This motion was struck out for being incompetent on 2/2/09. ELCA No. 34 of 2015 was dismissed for want of prosecution. ELC Petition No.7 of 2016 was dismissed for being an abuse of the process of Court. The bottom line is that the decision was a nullity. The Court is satisfied that this matter is not resjudicata because none of the matters cited above were heard and determined.

Whether the Plaintiff is entitled to a permanent injunction in respect of the suit land.

35. I have perused the said impugned orders issued by the Magistrates Court and it would appear that the order was that the suit land be subdivided into two equal parts between the houses of Nyambura and Wambui. The 1st Defendant has not explained how the titles ended up being issued in their names in the absence of petitioning for succession of the estates of the beneficiaries. It is clear that the said titles cannot be said to enjoy the protection of the law as they are susceptible to being challenged under section 26 of the Land Registration Act.

36. The Plaintiffs and the 1st Defendant are relatives. Going by their evidence both are elderly at the sunset ages of 94 and 71 years respectively. In these circumstances the Court holds that either party should bear their own costs.

37. Final orders;

(d) A declaration be and is hereby made that the findings of Land Dispute Tribunal case No.39/2008 are ultra vires its powers and the subsequent titles emanating from the subdivisions that is to say LR No. LOC. 8/KAGAA /1223 & 1224 and LOC 8/KAGAA/1406-1412 are hereby nullified and the Register be reverted to Land Refence No. LOC 8/KAGAA/611.

(e) The Land Registrar is mandated to rectify the Register and revert the land to the Plaintiff.

(f) A declaration that the 3rd Defendant's decision to adopt the findings of the Land Dispute Tribunal was ultravires.

(g) A permanent injunction be and is hereby issued against the Defendants, their servants employees servants and or agents from interference with LR LOC. 8/KAGAA /611.

(e) Each party to meet their cost of their suit.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 25TH DAY OF MARCH, 2019

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Opiyo HB for Mrs Ngetho

Makori HB for Peter Muthoni for the 1st Defendant

2nd – 4th Defendants – Absent

Irene and Njeri, Court Assistants