



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 18 OF 2018

MARTHA WANJIKU NYUTU.....1ST PLAINTIFF

PATRICK NYUTU MWANGL..... 2ND PLAINTIFF

ANN MARGARET WAMBUI NDUATI... 3RD PLAINTIFF

VS

SUSAN MWIHAKI NJOROGE.....1ST DEFENDANT

KAMAU MATEGA.....2ND DEFENDANT

THE LAND REGISTRAR, MURANGA...3RD DEFENDANT

JUDGMENT

1. This suit was filed in Nyeri under HCCC No 95 of 2010, then, and later transferred to Muranga and registered as ELC 18 of 2018. The Plaintiffs have urged the following orders against the Defendants jointly and severally;

a. A declaration that all the proceedings before the Maragwa Land Disputes Tribunal vide case No 146 of 2006 and Muranga PMCC LDT case No 89 of 2007 so far as they relate to the rights and ownership of LOC6/MUTHITHI/1433, 1722 & 1723 (suit lands) were procured fraudulently and unprocedurally by the 1st and 2nd Defendants; that they are unlawful and cannot found a binding judgements in law against the Plaintiffs herein and or their property in parcels LOC6/MUTHITHI/1433,1722 & 1723.

b. An order directing the Land Registrar Muranga to cancel the titles over LOC6/MUTHITHI/1041 and restore parcels Nos LOC6/MUTHITHI/1433,1722 & 1723 to the Plaintiffs.

c. An order of permanent injunction directed against the Defendants, their agents, servants or anybody claiming under them from in any way interfering with the Plaintiff's ownership, occupation and absolute rights over parcels LOC6/MUTHITHI/1433,1722 & 1723.

d. General damages directed against the 1st Defendant for trespass.

e. Costs of the suit.

2. The Plaintiffs aver that they are the registered owners of parcels LOC6/MUTHITHI/1433,1722 & 1723 having acquired them through purchase. That they have developed the lands by fencing and erecting permanent houses.

3. That unknown to them the 1st and 2nd Defendants have been litigating over the suit lands through interalia LDT No 146 of 2006 and SPMCC LDT 89 of 2007 in which there not made parties and yet their titles were affected to their detriment. That their titles were appropriated without being accorded the opportunity to be heard.

4. It is their case that the 1st Defendant caused the cancellation of their said titles by the 3rd Defendant. They aver that the cancellation was unlawful illegal and unprocedural and fraudulent. They have pleaded the particulars of illegality, fraud and want of procedure under para 13 of the Plaint on the part of the Defendants.

5. Further, they plead that the 1st Defendant has committed wanton acts of waste on the land such as uprooting, destroying and stealing all barbed wire fencing, posts and threatening the Plaintiffs with eviction.

6. The 1st Defendant denied the Plaintiffs claim in her statement of defence filed on the 25/8/10. In it, she averred that the titles held by the Plaintiffs were obtained fraudulently and the 2nd Defendant did not have a valid title to convey them to the Plaintiffs. She averred that the Plaintiff's titles were lawfully cancelled vide orders issued in LDT 89 of 2007. In addition, the subdivisions were fraudulent and the 2nd Defendant did not have the legal capacity/locus standi to effect the same. She claimed that her and her husband Njoroge Kibe were the rightful owners of LOC6/MUTHITHI/1041 since land demarcation and consolidation.

7. Further, that the award in LDT 146 of 2006 and the adoption order in LDT 89 of 2007 are lawful and no appeal, review or vacation has occurred. She posits that this suit is resjudicata as the same issues were determined in LDT 89 of 2007. She denied the particulars of fraud under para 13 in toto. She denied any trespass on the suit lands.

8. The 1st Defendant with the leave of the Court filed a Counterclaim on the 17/3/15 but withdrew the same on the 30/1/19.

9. The 2nd Defendant filed a statement of admission on the 17/3/15 in which he stated that at the time of LDT 146 of 2006 and LDT 89 of 2007, he was not the registered owner of the suit lands. The said lands had been transferred to third parties amongst them the Plaintiffs. That he tried to explain to the tribunal but did not heed. He supports the Plaintiffs case as filed.

10. The 3rd Defendant denied the Plaintiffs claim and in its statement of defence filed on the 25/8/2010 and in particular denied the specifics of illegality, fraud and want of procedure. Further it averred that if any titles were revoked and or cancelled it was regular, lawful and procedural and in furtherance of its statutory duties. They denied that the Plaintiffs have suffered any loss or damage nor are they entitled to any damages. They further contended that the suit is an abuse of the Court process and is statute barred and undertook to raise a Preliminary Objection to dismiss the same.

11. PW1 – Martha Wanjiku Nyutu testified on her own behalf and that of the 2nd and 3rd Plaintiffs and relied on her witness statement filed on the 21/5/13 and the affidavit sworn on the 11/8/10. That she and her Co-Plaintiffs did not acquire the suit lands from the 2nd Defendant but from third parties who had exchanged/purchased the same from the 2nd Defendant. That on 16/6/09 she visited the Lands office at Muranga with the intention of carrying out a search for purposes of securing a loan facility on her suit land LOC6/MUTHITHI /1722 whereupon the land register, one Mr Nyamweya informed her that their titles had been revoked. He however assured them that the said orders would be reversed as they were illegal. That their quest for joinder in the LDT 89 of 2007 was dismissed by the Court. In 2010 the adoption orders in LDT 89 of 2007 were registered effectively revoking their titles. The 1st Defendant immediately entered the suit lands that night and destroyed all the fence and carried away fencing materials. That she sought help from the police in vain. That she and the 2nd Plaintiffs live on the suit lands where they have developed a permanent house.

12. She testified that the 2nd Plaintiffs exchanged the land parcel No LOC6/MUTHITHI /1433 with Elizabeth Wanjiku Gicheha deceased. Parcels No LOC6/MUTHITHI /1432 was acquired by Esther Njeri Nganga from Stephen Chomba and subdivided it into two titles; 1722 and 1723. The two lands were transferred to the 1st and 2nd Plaintiffs in 2001 as a gift by their mother, Esther Njeri Nganga. That they got their titles in 1995 (2nd Plaintiff) and 2001 (1st and 3rd Plaintiff). She relied on her list of documents dated the 27/3/15 together with that dated the 28/5/15 and marked as PEX No 1-17.

13. DW1 – Susan Mwhiki Njoroge relied on her witness statement filed on the 15/3/12 and stated that she is the registered owner of the LOC6/MUTHITHI/1041 pursuant to the orders of the Court issued in LDT 89 OF 2007. The said orders ordered the cancellation of the Plaintiffs' titles which were rendered non-existent. That the stratum of the suit has dissipated on cancellation of the said titles and what is before the Court is an incompetent suit which is an abuse of the process of the Court. She contended that there was no contract of sale exhibited in favour of the Plaintiffs and the Plaintiffs are not purchasers for value. She faulted the Plaintiffs for not appealing against the said orders in LDT 89 of 2007. She charged that the Plaintiffs are illegally occupying the suit lands.

14. At the hearing she confirmed that the 1st and 2nd Plaintiffs live on the land and that they have built a permanent house though she stated that she could not remember when they constructed the house. She admitted that the Plaintiffs were not parties in the Land Dispute Tribunal proceedings. She claimed the coffee plants on the suit lands are hers. That the 2nd Defendant did not sell the land to the Plaintiffs but exchanged with third parties. She stated that she was not aware that the Plaintiffs had become registered owners of the suit lands by the time the proceedings in LDT 146 of 2006 commenced. She insisted that the 2nd Defendant did not purchase parcel LOC6/MUTHITHI/1041 from her husband.

15. DW2-John Kibe Njoroge informed the Court the Plaintiffs are his relatives. Equally the 2nd Defendant is a relative having being married his Aunt. That the Plaintiffs did not purchase the suit land from the 2nd Defendant. He gave the history of the land as thus; the original land was parcel LOC6/MUTHITHI/543 and was registered in the name of Ngugi Kibe his Uncle in trust for his family. Upon his death the land was succeeded by Njeri Kibe and Njoroge Kibe each getting 4.6 acres. After subdivision the land yielded LOC6/MUTHITHI/1041 (Njoroge Kibe) and 1040 (Njeri Kibe). He asserted that the 2nd Defendant did not buy the land from his father but took the land through unlawful means. In 1981 the 1st Defendant sued the 2nd Defendant for land but lost the case in HCCC No 298 of 1983. He stated that some of his family members are buried on the suit land. He stated that his mother the 1st Defendant became registered pursuant to the Court orders issued in LDT 89 of 2007. That he did not know that the Plaintiffs had become registered as owners of the suit lands by the time the orders were issued. He confirmed that the 1st and 2nd Plaintiffs live on the suit lands. He also confirmed that the Plaintiffs were not parties to the case in LDT 146 of 2006. He stated that he was not aware that the titles were no longer in the name of the 2nd Defendant.

16. DW3- Kamau Matega testified and relied on his witness statement on record together with the list of documents filed on the 21/12/18 and marked DEX 1-18. He informed the Court that he purchased the land LOC6/MUTHITHI/1041 from Njoroge Kibe as seen in the agreement dated the 12/10/78. Land control board consent to transfer was issued on the 11/9/78. He produced an affidavit sworn by Njoroge Kibe on 19/2/85 deponing that he sold LOC6/MUTHITHI/1041 to the 2nd Defendant. Following the sale the 1st Defendant sued her husband Njoroge

Kibe in HCCC No 225 of 1978 but the case was dismissed. She filed a suit at LDT Kigumo against Njoroge Kibe and the 2nd Defendant. It was adjudged that the land belongs to the 2nd Defendant. Other suits filed in 1983 and 1986 returned the same verdict that is to say the land belonged to the 2nd Defendant. He explained that upon obtaining consent of the Land Control Board he subdivided the land LOC6/MUTHITHI/1041 into three portions and exchanged with third parties. He clarified that he transferred no land to the Plaintiffs. By the time the LDT 146 was ongoing the parcel LOC6/MUTHITHI/1041 did not exist. The Plaintiffs were not parties in the Land Dispute Tribunal proceedings and yet they were the lawfully registered owners of the suit lands. He confirmed that the Plaintiffs reside on the suit land. That the family of the 1st Defendant have never taken up the offer of buying back one acre as advised by the elders (LDT), High Court and the appellate Court.

17. The 3rd Defendant did not attend the hearing and therefore did not defend itself against the Plaintiffs case.

18. The Plaintiffs submitted and rehashed the evidence as given by the 1st Plaintiffs at the hearing. They submitted that the proper way of challenging a judgement of a Court where a person was not a party on grounds of fraud is to file a new suit as they have done in this case. They relied on the case of **Jonesco Vs Beard (1930) AC 219** it was held that;

“it is settled practice of the Court that the proper method of impeaching a completed judgment on the ground of fraud is by action, in which the particulars of the fraud must be exactly given and the allegation must be established by strict proof”.

Although there is jurisdiction in special cases to set aside a judgment for fraud on a motion for a new trial, if for any special reason departure from the established practice is permitted; the necessity for stating the particulars of the fraud and the burden of proof are in no way abated and all the strict rules of evidence apply.”

Cole Vs Longford 1998 20,36 it was held that;

“where a judgment has been obtained by fraud, the Court has jurisdiction in a subsequent suit brought for that purpose to set the judgment aside”.

Foong Hong Vs H. Neotia & Company 1918 AC 888 which was quoted and adopted in the case of **Kahiga Kamau Vs Lorien Ranching Co Limited & others CA 234 of 2003** as follows;

“which was an appeal on a Preliminary Objection that had been dismissed by the High Court. The Court of Appeal held that the suit before the superior Court alleged and particularized fraud and therefore the company was to strictly prove these allegations.....”

19. In addition, they submitted that the proceedings were unlawful fraudulent and illegal. That the 1st Defendant concealed the fact that the title for LOC6/MUTHITHI/1041 was not registered in the name of the 2nd Defendant. She also concealed from the Land Dispute Tribunal that the suit lands belonged to the Plaintiffs and yet failed to notify the owners of the case at the tribunal. The effect of this was that orders detrimental to their right to property were issued. More so they argued that the tribunal was not imbued with the jurisdiction to deal with title to land. That the Plaintiffs were denied the right to be heard which is a fundamental right as enshrined in our constitution. The Plaintiffs titles were cancelled as a consequence of the said illegal proceedings.

20. The Plaintiffs submitted that the tribunal had no powers to overturn a decision of the appellate Court. That the 1st Defendant has been an incessant litigant having sustained various suit in respect to the suit land since 1982 upto the present suit. That this Court must bring this litigation to an end.

21. Relying on the case of **Giella Vs Cassman brown & Co. Ltd [1973] EA 358**, the Plaintiffs submitted that they have established a prima facie case to warrant the grant of injunction to prevent any further interference and trespass by the 1st Defendant. The Plaintiffs are the lawful owners of the suit lands and deserve the protection of the Court in their enjoyment of their rights to ownership in the suit land. They aver that trespass has been admitted by the 1st Defendant and urged the Court to find for damages on behalf of the Plaintiffs in the sum of Kshs 500,000/-

22. The 1st Defendant submitted that the 2nd Defendant is neither a purchaser nor a beneficiary of the land because he was married to Njoroge Kibe's sister. A number of the 1st Defendants' relatives are buried on the suit land. The 1st Defendant and her husband have been in possession and occupation of parcel 1041 since 1940s when she married Njoroge Kibe. They owned the land and no time did Njoroge Kibe sell the land to the 2nd Defendant. She submitted that the LDT 146 of 2006 lawfully returned the land parcel LOC6/MUTHITHI/1041 to the 1st Defendant. In any event the titles held by the Plaintiffs were obtained unlawfully. She faulted the Plaintiffs for filing a fresh suit instead of filing Judicial Review proceedings to quash LDT 146 of 2006 or an appeal against the decision of LDT 89 OF 2007. She submitted that the suit is a nullity and urged the Court to dismiss it with costs.

23. The 2nd Defendant filed submissions which rehashed the evidence as stated in his witness statement. He stated that he subdivided parcel LOC6/MUTHITHI/1041 into 3 parts and exchanged two with third parties. The 3rd portion parcel LOC6/MUTHITHI/1434 he further subdivided into two portions LOC6/MUTHITHI/1640 and 1641 and registered in his name. That the 1st Defendant has constructed a house on one of the parcels. He urged the Court to uphold the case for the Plaintiffs against the 1st Defendant who should be condemned to pay costs of the suit.

24. This is a matter that has had a long and torturous trail in the corridors of justice for over 3 decades. The 1st and 2nd Defendants have furiously and variously litigated and relitigated in the Courts as well as the Land Dispute Tribunal. From the record and the evidence adduced

the following observations can be gleaned;

- a. The parties are related. The 1st and 3rd Plaintiffs are sisters being daughters of Esther Njeri Nganga. The 2nd Plaintiff is the husband of the 1st Plaintiff. The 2nd Defendant was the brother in law to Njoroge Kibe, the husband of the 1st Defendant. Njoroge Kibe and Kibe Ngugi were brothers, being the sons of the house of Wambui, one of the three wives of the family patriarch namely Kibe.
- b. The original suit land parcel No LOC6/MUTHITHI/ 543 was registered in the name of Kibe Njoroge. Upon his death he was succeeded by his wife Njeri Kibe and his brother Njoroge Kibe as joint registered owners of the land as at 7/9/78. The land was subdivided into parcels; LOC6/MUTHITHI/1040 and 1041 for Njeri Kibe and Njoroge Kibe respectively. Njoroge Kibe became registered owner of parcel LOC6/MUTHITHI/1041 on the 15/8/79.
- c. On the 12/10/1978, Njoroge Kibe sold his portion of parcel LOC6/MUTHITHI/ 1041 measuring 4.6 acres to the 2nd Defendant at Kshs 150,000/-. Land control board consent dated the 11/9/78 was duly obtained. The land was sold together with 540 coffee trees thereon.
- d. Upon completion of the purchase the 2nd Defendant became registered as owner on 21/5/82.
- e. The 1st Defendant filed a caution claiming beneficial interest on the land on 15/1/83, which entry was removed on 10/7/89 vide section 133 (2) (a) of the Registration of Land Act, then.
- f. Dissatisfied with the turn of events, the 1st Defendant filed a suit against her husband, Njoroge Kibe in HCCC No 225 of 1978 which was dismissed.
- g. On the 16/8/79 she filed a caution on the title claiming beneficial interest and refused to vacate the suit land.
- h. In 1982 she filed a dispute at the LDT Kigumo against Njoroge Kibe and the 2nd Defendant claiming ownership of parcel LOC6/MUTHITHI/1041. The panel of elders held that the land belonged to Njoroge Kibe who lawfully sold it to the 2nd Defendant. Njoroge Kibe was advised to buy back one acre from the 2nd Defendant for the settlement of the 1st Defendant. It would appear this was not followed up.
- i. The 2nd Defendant sued the 1st Defendant in HCCC No 298 of 1983 for eviction where the Court ordered the 1st Defendant to vacate the suit land.
- j. Aggrieved by the orders of the High Court above, she proffered an appeal in CA No.125 of 1986 where the Appellate Court dismissed the appeal and upheld the decision of the High Court that the land belonged to the 2nd Defendant and the 1st Defendant must vacate.
- k. In 1989, the 2nd Defendant proceeded to subdivide parcel LOC6/MUTHITHI/1041 into 3 portions; LOC6/MUTHITHI/1432, 1433 and 1434 measuring 2.6 acres, 1.0 acre, 1.0 acre respectively. Upon completion of the subdivision parcel LOC6/MUTHITHI/1041 was closed in the register and it ceased to exist.
- l. The 2nd Defendant exchanged Parcel LOC6/MUTHITHI/1432 with another land from Stephen Chomba. Later the said Chomba sold this land to Esther Njeri Nganga. Mrs Nganga subdivided parcel 1432 to yield two parcels; LOC6/MUTHITHI/1722 and 1723 which became registered in the names of 1st and 2nd Plaintiffs respectively in 2001. The register denotes the conveyance as a gift.
- m. Parcel LOC6/MUTHITHI/1433 was exchanged with Elizabeth Wanjiru Gicheha who later sold to Patrick Nyutu in 1995. This is the 2nd Plaintiff.
- n. Parcel LOC6/MUTHITHI/1434 remained registered in the names of the 2nd Defendant who later subdivided into parcels LOC6/MUTHITHI/1640 and 1641.
- o. Unbowed by the appellate decision, the 1st Defendant procured an order dated the 7/2/2006 allegedly issued in Misc. Application No 146 of 2006 that the 2nd Defendant be removed from parcel LOC6/MUTHITHI/1041 and the land be transferred to John Kibe Njoroge Kibe, the 1st Defendant's son. This order revoked the subdivisions of the suit lands and reverted the land to parcel LOC6/MUTHITHI/1041. Vide a letter dated the 28/10/08 the Senior Principal Deputy Registrar, High Court Nairobi confirmed the Misc application No 146 of 2006 was in respect to a bill of costs filed by Messrs Kirundi & Company Advocates and Nairobi City Council and that the alleged order did not originate from his office. This order having been found to be forged the entries made on the title pursuant to the said orders were reversed on the 11/11/08 by the Land Registrar, Muranga. It is not disclosed what action was taken against the 1st Defendant in this regard.
- p. Not one to give up, the 1st Defendant filed a dispute vide LDT case at the tribunal against the 2nd Defendant claiming ownership of parcel No LOC6/MUTHITHI/1041. The panel of elders gave an award that the 1st Defendant be registered as owner of parcel LOC6/MUTHITHI/1041 and all the sub divisions arising therefrom be cancelled.

q. This award was adopted by the Court in LDT 89 of 2007 as an order of the Court.

r. Following the adoption of the order the parcel No LOC6/MUTHITHI/1041 became registered in the name of 1st Defendant and all the subdivisions including the suit land arising from LOC6/MUTHITHI/1041 were cancelled and the land reverted to parcel LOC6/MUTHITHI/1041.

s. The Plaintiffs suit lands were therefore cancelled pursuant to this order which action has triggered the instant suit.

25. Having analysed the pleadings, the evidence, the submissions of the parties and all the materials placed before me the issues for determination are;

- a. Whether the proceedings of LDT 146 of 2006 are unlawful irregular and unprocedural
- b. Whether the orders issued in LDT 89 of 2007 bind the Plaintiffs in respect to their suit lands.
- c. Whether the Plaintiffs claim over the suit parcels is resjudicata.
- d. Whether the 2nd and 3rd Defendant were guilty of fraud (if any).
- e. Whether the title No LOC6/MUTHITHI/1041 should be cancelled
- f. Whether the 1st Defendant has trespassed onto the Plaintiffs suit lands
- g. Who meets the costs of the suit?

Whether the proceedings of LDT 146 of 2006 unlawful irregular and unprocedural

26. It is the Plaintiffs' case that by the time the LDT 146 of 2006 was filed they had obtained titles to the suit lands in the years 1995 and 2001 and the 1st and 2nd Defendants were aware or ought to have been reasonably aware that the 2nd Defendant had no interest in the titles. The action of excluding them from the Land Dispute Tribunal dispute condemned them unheard, the result of which their titles were cancelled without affording them the opportunity to be heard. The 1st Defendant insists that the titles were cancelled lawfully and it was for the Plaintiffs to appeal or file judicial review to quash the award within the stipulated time in law. To begin with the Plaintiffs were not parties in the Land Dispute Tribunal proceedings. I have seen attempts by the Plaintiffs for joinder into the LDT 89/2007 in which the Learned Magistrate rightly disallowed the application on the basis that there was no suit for determination before him. His only duty was to adopt the award of the panel of elders.

27. The powers of the land disputes tribunal are set out under section 3 to include the division of, or the determination of boundaries to land, including land held in common; a claim to occupy or work land; or trespass to land. In this case the tribunal determined a claim of ownership in land. This was in excess of its mandate and thereby acted illegally on account of want of jurisdiction. Jurisdiction of a Court or a tribunal flows from the Constitution or statute or both. A body cannot purport to arrogate itself powers that the law has not granted.

28. The *locus classicus* on jurisdiction is the celebrated case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

29. Clearly the tribunal acted ultravires its mandate and its orders are wrought with illegalities and unlawfulness.

30. I have perused the proceedings of the LDT 146 of 2006 and it is clear that the 2nd Defendant disclosed to the tribunal that he no longer held title to the subdivisions arising from parcel LOC6/MUTHITHI/1041 except for two portions whose numbers had been duplicated. It is also clear that the Plaintiffs were not parties to the dispute and that the tribunal without jurisdiction proceeded to cancel their titles without their being heard. The 1st Defendant obtained a benefit as a result of a fraud by concealing that the Plaintiffs held valid titles and ought to have been enjoined to the dispute so that they defend their titles.

31. Whether or not the exclusion of the Plaintiffs from the tribunal case amounted to fraud can be determined by considering the definition of fraud. The broad definition of fraud may be derived from the case of **Jandu -Vs- Kirpal & Another (1975) EA 225**, at pg. 231 where the elements of fraud are outlined as a proven knowledge, the existence of an unregistered interest and knowingly and wrongfully defeats. Reliance was also sought in section 75 of the Registration of Titles Act that preserves the Court's jurisdiction for cases of 'actual fraud' as well as **Black's Law Dictionary 1990**. Which defines fraud as:

“An intentional perversion of the truth for the purpose of inducing another in reliance upon it to part with some valuable thing or to surrender a legal right; a false representation of a matter of fact, whether by words or conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal inquiry; anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether it be by direct falsehood or innuendo, by speech or silence, word of mouth, or look or gesture;

fraud comprises all acts, omissions, and concealments involving a branch of legal or equitable duty and resulting in damage to another.”

32. The Defendant had an obligation to confirm the particulars of ownership before taking out a case to recover the land .This is key noting that the orders affected title and the Defendant before the Land Dispute Tribunal had warned them that he had already subdivided the land .These facts are not disputed .The 1st Defendant did not sue the said Esther Njeri who she intended to defraud or the subsequent transferee .This conduct is malafides .It fits well in the definition set out above.

33. The 1st Defendant was aware that the parcel had ceased to exist since she attempted to cancel the new titles through the impugned order .She however moved or misrepresented facts before the tribunal and sued the 2nd Defendant over No LOC 6/MUTHITHI / 1041.

34. The Constitution under Article 47, 48 and 50 guarantees a person the right to a fair administrative action, the right to access justice in a Court or a tribunal and a right to be heard in an open and fair manner. All these rights were denied with the consequence that their right to property was violated. Their titles were cancelled to their detriment.

35. The powers to cancel titles are the preserve of the Court. Section 80 read together with section 26 of the Land Registration Act empowers the Court to cancel a title on satisfaction that the said title was obtained by fraud or mistake for which the person was a party. The Land dispute Tribunal in ordering the cancellation of title of the Plaintiffs acted contrary to the law and its actions and awards are a nullity and have no legal effect.

Whether the orders issued in LDT 89 of 2007 bind the Plaintiffs in respect to their suit lands.

36. Section 7(2) of the Land Dispute Tribunal Act (now repealed) empowered the Learned Magistrate to adopt the award that is to say to 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. In this case the finding of the Court is that the award having been obtained in excess of jurisdiction, there were no valid orders adopted by the Court.

37. In the case of **James Alukoye Were...Vs...Lurambi Division Land Disputes Tribunal, Misc. Civil Appl. No.165 of 2005**, where the Court too held that:-

“The Land Disputes Tribunal has no powers to arbitrate on matters involving title to land or give such order to grant specific performance to rectify the register.”

38. In the case of **Macfoy Vs. United Africa Co. Ltd [1961] 2 ALL ER 1169 at 1172** the Court held 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.

39. It follows that nullities beget nullities. The award of the tribunal was a nullity. Its adoption however procedurally correct it may have been did little to sanitize the same. What is key is that this Court cannot enforce orders that were a nullity and void abinitio. To give effect to these orders would be aiding an illegality. In the case of **Arthi Highway Developers Limited –Vs- West End Butchery Limited & 6 Others, Court of Appeal at Nairobi, Civil Appeal No. 246 of 2013 (2015) eKLR**, the Court of appeal when confronted with similar facts of fraud on appeal where certain crooks fraudulently acquired title to land and later sold the same to other parties upheld the ELC Court’s decision to cancel all titles and ordered the land to revert back to the original owner.

40. In the case of **Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] EKLR** the learned Judge when addressing a similar case stated;

“I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists”.

41. In the case of **National Bank of Kenya Ltd v Wilson Ndolo Ayah [2009] eKLR** it was emphasized as a sound public policy that Courts should not aid in the perpetuation of illegalities.

42. It is the finding of this Court that the orders issued in LDT 89 of 2007 are null and void and have no effect. They do not bind the titles of the Plaintiffs.

43. It is on record that the High Court in HCCC No 298 of 1983 and the appellate Court in CA No.125 of 1986 determined the ownership of parcel LOC6/MUTHITHI/1041. The ownership dispute was settled by the Court both in original and appellate level so much so that the 2nd Defendant was declared the owner of the land and the 1st Defendant was ordered to vacate the suit land and in default the Court set out the consequences for non-compliance. These orders have not been set aside, appealed vacated nor removed from their binding effect in respect to parcel LOC6/MUTHITHI/1041. It is not acceptable to purport to challenge the decision of the Appellate Court by pseudo proceedings such as those brought by the 1st Defendant in the Land Dispute Tribunal proceedings and her defence raised in this suit. The actions of both the parties and the Land Dispute Tribunal in that respect are null and void.

44. Art 23 of the Constitution read together with section 13(7) of the Environment and land Act empowers this Court to grant any relief as

the Court deems fit and just including interim or permanent injunctions, prerogative orders award of damages compensation declarations, orders of judicial review interalia. Section 3A of the Civil procedure Act reserves inherent power to the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. The actions of the 1st Defendant including the procurement of forged orders are tantamount to abuse of the process of the Court. The Plaintiffs have sought declarations and it is the view of this Court that it is not enough to declare the proceedings and the orders of adoption illegal irregular and fraudulent. The Court exercising its inherent powers to meet the ends of justice and prevent abuse of the process of the Court, do hereby quash the said proceedings and the adoption orders in their entirety. I am fortified by Art 159 of the Constitution to ensure substantive justice is not only seen to be done but met.

Whether the Plaintiffs claim over the suit parcels is resjudicata.

45. Section 7 of the Civil Procedure Act enacted that;-

“ No Court shall try any suit or issue in which the matter 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 of 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.”

46. The 1st Defendant has alleged that the tribunal’s award was not set aside vacated or appealed and that the Land Dispute Tribunal determined the rights of the parties as far as the suit land is concerned. It was her case that this suit is resjudicata.

47. *The Court in the case of John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR* held that to succeed in raising the bar of resjudicata a person must show the following;

- a. Was there previous litigation in which identical claims were raised or in which identical claims could have been raised?
- b. Are the parties in the present suit the same as those who litigated the original claim?
- c. Did the Court which determined the original claim have jurisdiction to determine the claim?
- d. Did the original action receive a final judgment on the merits?

48. **In the case of Attorney General & Another ET –Vs- [2012] e KLR, the Court held that:**

“The Courts must always be vigilant to guard litigants evading the doctrine of resjudicata by introducing new causes of action so as to seek the same remedy before the Court. The test is whether the Plaintiff in the second suit is trying to bring before the Court in another way and in a form of a new cause of action which has been resolved by a Court of competent jurisdiction. In the case of Omondi vs NBK & Others [2001] EA 177 the Court held that “parties cannot evade the doctrine of resjudicata by merely adding other parties or causes of action in a subsequent suit.” In that case the Court quoted Kuloba J, (as he then was) in the case of Njanju v Wambugu and another Nairobi HCC No. 2340 of 1991 (unreported) where he stated: If parties were allowed to go on litigating forever over the same issue with the same opponent before Courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to Court, then I do not see the use of doctrine of resjudicata...”

49. The tribunal did not have any power to determine the Plaintiffs’ ownership of title .The Principal magistrate only adopted the award and could not deal with any applications to enjoin the Plaintiff or contest the award. The Land Dispute Tribunal did not have power to deal with a dispute relating to ownership in registered land. To that extent the Land Dispute Tribunal was not a competent Court and therefore not resjudicata.

Whether the 2nd and 3rd Defendant were guilty of fraud (if any).

50. The Plaintiffs have not established any fraud on the part of the 2nd Defendant. It is not contested that the 2nd Defendant was not the Plaintiff / Complainant before the tribunal. The 2nd Defendant pointed out before the two forums that the parcel of land belonged to 3rd parties who were not party to the proceedings. The Court did not find any evidence of conspiracy to defraud.

51. The 3rd Defendant on the other hand seems to have made entries pursuant to Court orders that were presented to the Registrar. However, the Plaintiff has not discharged any burden of proof to indicate that the Land Registrar acted in abuse of its statutory power. Evidence on record shows that it is through the vigilance of the Land Registrar that forged orders were discovered. There was no evidence before the Court to point any fraud on the 3rd Defendant. The Land Registrar also raised the issue of want of Jurisdiction of the tribunal.

Whether the title No LOC6/MUTHITHI/1041 should be cancelled.

52. Having held that the proceedings and the orders of the Land Dispute Tribunal were illegal, this Court exercising its powers under section 80 of the Land Registration Act holds and finds that the justice of this case is in cancelling the title of parcel No LOC6/MUTHITHI/1041 in the name of the 1st Defendant and restoring the titles of the Plaintiffs. It is already held that the orders of the Land Dispute Tribunal were obtained illegally fraudulently with the connivance and involvement of the 1st Defendant as a party.

Whether the 1st Defendant has trespassed onto the Plaintiffs suit lands

53. Trespass Act Cap 294 Laws of Kenya, Trespass upon private land is defined as:

“(1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.

(2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him”.

54. It is trite that trespass is actionable per se. The proof for damages is not necessary once established the Court has the discretion to quantify damages. In this case, the fact that the 1st Defendant has uprooted fences on the suit parcel is not disputed. It is on record that the Court found in its ruling that the 1st Defendant trespassed onto the suit land. The Court issued an injunction to restrain the 1st Defendant from trespassing onto the Plaintiffs land.

55. The Court holds that the Plaintiffs have proved trespass on the part of the 1st Defendant. The Plaintiffs have urged the Court to award general damages of Kshs 500,000/-. I find nominal general damages in the sum of Kshs 250,000/- for trespass.

56. Going by the celebrated case in **Giella vs Cassman Brown [1973] EA 358**, this Court having held that the Plaintiffs are the rightful owners of the suit lands, the Plaintiffs have established a prima facie case to warrant the grant of permanent injunctions against the 1st Defendant.

Who meets the costs of the suit?

57. Costs follow the event. The 1st Defendant is condemned to pay the costs of the Plaintiff.

58. Final orders;

a. A declaration that all the proceedings before the Maragwa Land Disputes Tribunal vide case No 146 of 2006 and Muranga PMCC LDT case No 89 of 2007 so far as they relate to the rights and ownership of LOC6/MUTHITHI/1433,1722 & 1723 (suit lands) are illegal fraudulent and unlawful. They are null and void and have no binding effect on the suit lands.

b. The proceedings of the Maragwa Land Disputes Tribunal vide case No 146 of 2006 and the adoption orders issued in Muranga PMCC LDT case No 89 of 2007 so far as they relate to the rights and ownership of LOC6/MUTHITHI/1433,1722 & 1723 be and are hereby quashed entirely.

c. An order directing the Land Registrar Muranga to cancel the titles over LOC6/MUTHITHI/1041 and restore parcels Nos LOC6/MUTHITHI/1433, 1722 & 1723 to the Plaintiffs and all the resultant subdivisions. The Register be rectified by cancellation of entries Nos. 11-18 and restoration of entry No 10.

d. Titles Nos. LOC6/MUTHITHI/1433, 1722 & 1723 be and are hereby restored in the register in the names of the Plaintiffs.

e. An order of permanent injunction directed against the Defendants, their agents, servants or anybody claiming under them from in any way interfering with the Plaintiff's ownership, occupation and absolute rights over parcels LOC6/MUTHITHI/1433, 1722 & 1723.

f. General damages for trespass in the sum of Kshs 250,000/- payable by the 1st Defendant to the Plaintiffs.

g. The 1st Defendant shall meet the costs of the suit in favour of the Plaintiffs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 9TH DAY OF MAY, 2019

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

1st Plaintiff: Present in person. Advocate is absent

2nd Plaintiff: Present in person. Advocate is absent

3rd Plaintiff: Present in person. Advocate is absent

Gachau HB for TM Njoroge for the 1st Defendant

2nd Defendant: Present in person

Terrell for the 3rd Defendant.

Irene/Njeri; Court Assistants