



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC APPEAL NO 13 OF 2018

(Formally Nakuru High Court Civil Appeal No. 9 of 2014)

MWANGI GICHAMA.....APPELLANT

VERSUS

WANJIRU KINGORI.....1st RESPONDENT

DANIEL WAHOME KINGORI.....2nd RESPONDENT

Being an appeal against the Judgment/decree of Ag Senior Principal Magistrate

at Nyahururu Principal Magistrate's Court (delivered on 11th December 2013)

in

PMCC No. 95 of 2004

JUDGEMENT

1. What is before me for determination on Appeal is a matter which was heard by D.K MIKOYAN *Ag Senior Principal Magistrate in the Principal Magistrate Court at Nyahururu in Civil Case No. 95 of 2004* where the learned trial Magistrate, upon considering the evidence of both parties, dismissed the Plaintiff's suit and entered judgment for the Defendant as prayed in both files as consolidated *on the 4th December 2013*.
2. The Appellant/Plaintiff, being dissatisfied with the judgment of the trial Magistrate filed the present Appeal before the High Court sitting in Nakuru on the 27th August 2015.
3. The grounds which the Appellant has raised in his Memorandum of Appeal include:
 - i. The learned trial Magistrate erred both in law and fact in failing to find that the Appellant had proved on a balance of probability that he was the absolute registered owner of parcel No. Laikipia/Salama Muruku Block 1/332 (old No. 191)
 - ii. The learned trial Magistrate erred both in law and fact in finding that the suit file vide Nyahururu SRMCC No. 52 of 1990 was heard by the land Disputes Tribunal, a court with parallel jurisdiction.
 - iii. The learned trial Magistrate erred both in law and fact in failing to appreciate that the dispute filed vide Nyahururu SRMCC No. 52 of 1990 was referred by the court to elders for determination under the chairmanship of the District officer (D.O) Rimuruti Division.
 - iv. The trial Magistrate erred in law in failing to appreciate that he did not have jurisdiction to question the award made by the elders as well the Judgment (sic) made and decree issued by the court in Nyahururu SRMCC No. 52 of 1990.
 - v. The learned trial Magistrate erred both in law and fact in failing to appreciate that the decree issued in Nyahururu SRMCC No. 52 of 1990 on the 2.6.1994 finally and conclusively determined the rights of the Appellant and KANYEKI KINGORI (deceased) regarding parcel No. Laikipia/Salama Muruku Block 1/332 (old No. 191)

vi. The learned trial Magistrate erred both in law and fact in failing to find that the Respondents' action in interring the bodies of KANYEKI KINGORI (Deceased) and KINGORI KANYEKI (Deceased) in parcel No. Laikipia/Salama Muruku Block 1/332 (old No. 191) amounted to trespass.

vii. The learned trial Magistrate erred both in law and fact in failing to properly evaluate the credible evidence adduced by the Appellant and his witnesses thus misdirecting himself on the issues before him which resulted to miscarriage of justice to the Appellant.

viii. The learned trial Magistrate erred both in law and fact in dismissing the Appellant's suits.

4. According to the proceedings herein, the Appellant had instituted two suits against the Respondents where the first suit being PMCCC No. 95 of 2004 was filed vide a plaint dated 2nd April 2004 on the 6th April 2004 and the second suit being PMCCC No. 117 of 2005 was filed on the 26th April 2005 vide a Plaint dated 25th April 2005. In both the suits, the Appellant had sought for the following orders:-

- (a) A declaration that title No. Laikipia/Salama Muruku Block 1/332 (old No. 191) belongs to the Plaintiff herein absolutely'.
- (b) An order that the action of the Defendants herein in interring the remains of Kingori Kanyeki(deceased) on title No Laikipia/Salama Muruku Block 1/332 (old No. 191) on 5/4/2005 was illegal.
- (c) An order directing the Defendants jointly and severally to exhume the remains of the said Kingori Kanyeki from title No. Laikipia/Salama Muruku Block 1/332 (old No. 191) and in default the Officer Commanding Police division (OCPD) Laikipia be directed and authorized to exhume the remains of Kingori Wanyeki (deceased) from title No. Laikipia/Salama Muruku Block 1/332 (old No. 191) and have the same interred in any cemetery at the cost of the Defendants.
- (d) The Defendants do pay costs of this suit together with the interest at court rates.
- (e) Any other or better relief that this court may deem fit to grant.

5. The Respondents filed their defences dated the 6th May 2004 and 13th June 2006 respectively wherein they generally denied all the allegations in the Appellant's plaint averring that the deceased was legally entitled to the possession of the suit land as the owner thereof and that their action of interring his body, as was as averred by the Appellant, was lawful and undertaken in honest belief of their right to property and without knowledge of the Appellant's claim.

6. The two matters were consolidated on the 9th August 2006 with file No. 95 of the 2004 being the controlling file. The matter was subsequently heard with the result that the Appellant's suit was dismissed and judgment entered for the Respondents.

7. The Appellant, being dissatisfied with the judgment, filed the present appeal which was admitted on the 31st January 2019 with direction that parties file their respective written submissions.

The Appellant's Submissions.

8. The Appellant's submission in seeking to set aside the judgment and decree of the trial Magistrate made on the 11th December 2013, prays that the Appeal be allowed with costs and the Judgment by the trial court be substituted with an order allowing the Appellants' suits as prayed. He also seeks for any other orders as the court may deem fit to make in the circumstance.

9. The Appellants' submission gave a brief history of the matter in question before faulting the trial Learned Magistrate as per the grounds in his memorandum. To this effect he submitted that matter before court was first filed by the Appellant against Kanyeki Kingori (deceased) in the SRMCC court as No 52 of 1990 wherein the court referred the parties for arbitration which was done by a panel of elders chaired by the District Officer, Ndaragwa.

10. That the elders heard the matter and filed their award in court which was adopted as the court's judgment on the 2nd June 1994 and a decree issued on the 13th June 1994.

11. That the said decree which was adopted as the court was a valid decree which conclusively determined that matter and the rights of the Appellant and Kanyeki Kingori in regard to the suit land being Laikipia/Salama Muruku Block 1/332 (old No. 191). The said decree was never set aside, reviewed or appealed against.

12. The appellant relied on the provisions of Section 9E (1) of the Magistrates' Courts Act (now repealed) as well as on the decided case in **Andrew Kimani Ngumba & Another vs Zakaria Muigai Kibe [1997] eKLR** to submit that the effect of the decree issued in the Nyahururu SRMCC No. 52 of 1990 declared the Appellant the absolute registered proprietor of the suit property in terms of Section 27 of the Registered Land Act (now repealed).

13. That the Appellant, pursuant to the order from the court, had subsequently been registered as the proprietor of the suit land wherein he had been issued with a title deed on the 16th January 2002. The said title was prima facie evidence that he was the absolute and indefeasible owner of the suit land in terms of Section 32 of the Registered Land Act (repealed) and replicated in Section 26 of the Land Registered Act.

14. It was the Appellant's submission that had the trial learned Magistrate applied his mind on the evidence on record and the law

applicable, he should not have questioned the Appellant's ownership of the suit property. He therefore misdirected himself on this issue.

15. The Appellant further submitted that despite the elders' award having been adopted by the court, and the evidence in court having not been challenged, the trial Magistrate had in his judgment, questioned the jurisdiction of the Tribunal in determining matter of ownership of land. It was therefore his submission that this finding was erroneous since the Magistrate had no jurisdiction to question the award whether the same was made either by the tribunal or elders, as he understood it to be the judgment by the court.

16. The Appellant also faulted the trial magistrate for failure to make a determination as to whether interring of the bodies in the suit land amounted to trespass. It was their submission that through the evidence adduced in court, it had been clear that he was the absolute proprietor of the suit land, a fact which had also been confirmed by Respondents in writing. That despite this fact, the Respondents had gone ahead and buried the bodies of both Kanyeki Kingori and his son Kingori Kanyeki on the suit land, an action which was illegal but to which the trial Magistrate made no finding and/or determination.

17. That the court had therefore failed to apply its mind to the evidence on record and on its applicability therefore arriving at the wrong decision. In so submitting, the Appellant relied on the decided case of **Martha Kigen vs Johanan Tibino [2014] eKLR** wherein the court ought to have exercised its powers to order for the Respondents to disinter the remains of both Kanyeki Kingori and his son Kingori Kanyeki from the suit land and in default the Appellant be allowed to apply for and order to exhume the remains with the assistance of the Public Health Officer, Laikipia County.

18. The Appellant also faulted the trial Magistrate for failing to consider the evidence and submissions of the Appellant. He thus asked this court as an appellant court and pursuant to the guiding principles set out in the case of **Mwanasokoni vs Kenya Bus Service Ltd Civil Appeal No. 35 of 1985 [1985] eKLR**, to interfere with the findings of the trial Magistrate, re-evaluate and analyze the evidence afresh so as to make its determination.

19. That further, the trial Magistrate had misdirected himself on law and in fact when he took into consideration matters that had not been pleaded and/or supported by evidence thereby entering judgment in favour of the Respondents wherein no counter claim had been pleaded.

20. The Respondent prayed for the Appeal to be allowed.

Respondent's Submission.

21. In opposition of the Appeal herein, the Respondents' tackled the grounds of appeal as framed by the Appellant to which on the 1st ground, their submission was that whereas the Appellant had been registered as proprietor of the suit land, his registration was not absolute but subject to the Respondents' right as occupier thereof pursuant to the provisions of Section 30(g) of the repealed Registered Land Act, which law was applicable at the time of the delivery of the Judgment.

22. The Respondents relied on the Section 3 (1) of the Land Disputes Tribunal Act (now repealed) to submit that indeed the Trial Magistrate had rightly found that the panel of elders in the Land Disputes Tribunal had no jurisdiction in cancelling the 1st registration of Kanyeki Kingori as proprietor of the suit land, an award which had been adopted by the court on the 9th December 1993 and conferred title upon the Appellant herein. They relied on the decided cases of;

i. Moses Makokha Osanya vs Elekia Mabosio Marenga [2018] eKLR and

23. **Eunice Muthoni Gatugi vs Lusalia Wamweru & Other [2018] eKLR** amongst others to submit that indeed the Land Disputes Tribunal had no jurisdiction to order cancellation of a title to a registered land no matter how noble its intention were. That it therefore followed that the award by the tribunal cancelling the Plaintiff's title to the suit land and the subsequent order in Nyahururu Arbitration Case No.13 of 2008 adopting it, were all made in excess of jurisdiction and were a nullity and this court must set it aside.

24. That further, Section 143 of the repealed Registered Land Act gave immunity to cancellation of title to land which was founded on a first Registration. That the trial Magistrate's decision was correct and cannot be legally upset through the present Appeal.

25. The Respondent further relied on the case of **Kenya Power and Lighting Company Ltd vs Bensene Holdings Ltd T/A WYCO Paints [2016] eKLR** to submit that the court of law had no jurisdiction to do an injustice to a party. That the trial court was therefore correct to hold that the Appellant's title to the suit land which was obtained through a flawed legal process could not be the basis of granting the orders sought in the two suits filed by the Appellant.

26. That the second ground of the Appellant's appeal was not supported by the record of the trial court to the effect that what the trial Magistrate had referred to was the adoption of the proceedings of a null and void award which was done by the court of parallel jurisdiction. The reference made was not to the Disputes tribunal as a court of parallel jurisdiction.

27. On the 3rd Ground of appeal, it was the Respondent's submission that the award dated the 9th December 1993, having been filed in court on the 5th January 1994 minus any proceedings attached thereto, the same must have been made pursuant to the provisions of Section 4 of the Land Disputes Tribunal Act and not pursuant to the Magistrate's Jurisdiction (Amendment) Act, 1981 which Act was repealed.

28. That the said award which was adopted as a judgment of the court was made by an entity that had no jurisdiction to cancel the title to the suit resulting into the same being registered in the name of Kanyeki Kingori. The Respondent relied on the case of **Joseph Karobia Gicheru vs Michael Gachki Gicheru [2013]eKLR** in support of their submission.

29. On the 4th ground, of the Appellants ground of Appeal, the Respondents reiterated on their submissions in ground 1 and submitted that the document submitted and adopted as an elders award was a mere letter which could not pass the test of an award under the land Disputes Tribunal Act to cancel title under the then Registered land Act(now repealed)

30. That the Appellant had attempted to get title of the suit land through different court proceedings using a title deed obtained through questionable process to which the court was entitled to interrogate. The Trial magistrate was therefore right in making the decision he made.

31. That since the court was empowered by virtue of Order 42 Rule 32 of the Civil Procedure Rules in exercise of its inherent powers, to cancel title held by the Appellant, the Respondents sought that the court affirms the decision made by the trial court and to order for the cancellation of the Appellant's title to the suit land.

32. On the 5th ground, it was the Respondents' submission that the trial court having been invited to declare that title to parcel No. Laikipia/Salama Muruku Block 1/332 (old No. 191) belonged to the Appellant, it was incumbent of the court to interrogate the process through which the Appellant obtained the title to the suit land.

33. On grounds No. 6, 7 and 8, the Respondents' submission was to the effect that having analyzed and evaluated the Appellant's case and further, having found that the process upon which the Appellant obtained title to the suit land was flawed, the court could not make an order for exhumation of the bodies interred therein. That the trial court was therefore right in dismissing the Appellant's suit. That the trial court having arrived at a correct decision, the Appeal herein ought to fail and be dismissed with costs and there be an order of cancellation of the Appellant's title to the suit property.

Analyses and Determination

34. I have considered the record, the judgment by the trial Magistrate, the submissions by learned Counsel, the authorities cited on behalf of the respective parties and the law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the evidence, assess it and make my own conclusions on the evidence, subject to the cardinal fact that I did not have the advantage singularly enjoyed by the trial Magistrate, of seeing and hearing the witnesses as they testified. (*See Seascapes Ltd v. Development Finance Company of Kenya Ltd [2009] KLR, 384*). I also remind myself that this Court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the magistrate is shown demonstrably to have acted on wrong principle in reaching the findings he did. (*See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982-88] 1 KAR 278*).

35. The basis of the Appellants' claim is that having been registered as the proprietor of the suit land on the 16th January 2002 and issued with a title deed to the same, he had been installed as the sole proprietor of the suit land and therefore the Respondents herein had no right to bury the bodies of Kanyeki Kingori and his son Kingori Kanyeki on the same, an act which amounted to trespass. That it was therefore in order for him seek that the said bodies be exhumed from his parcel of land.

36. The Respondents' contention on the other hand is that the process by which the Appellant was registered as proprietor to the suit land was flawed and therefore the said title was a candidate for cancellation.

37. Looking at the evidence tendered before in court, the same is to the effect that in 1987, the Appellant herein had purchased the suit land which was then No. 191, for Ksh 21,000/= from one Paul Muchiri Kibe, who had testified as PW 2 and who had also bought the parcel land from one Peter Kimani around the year 1975.

38. That they had reduced their agreement in writing, wherein he had paid a deposit of Ksh 2,000/on the 15th February 1987. The balance was to be paid upon the transfer of the land. That he had paid the balance of Ksh19,000/= on the 18th July 1987 wherein the suit land had been transferred to him and he had taken possession, fenced it and put it into use although he did not reside thereon.

39. That it had been at the time he sought to survey the land that he had discovered that title to the same bore two names being his and that of the deceased Kanyeki Kingori. The matter was reported to the District Officer wherein a panel of elders returned their verdict to the effect that the land was indeed his and he was asked to pick his title from Nanyuki lands office. The matter had thus been resolved.

40. It was when he had gone to pick the title that he found out that the same had been registered in the names of Kanyeki Kingori, his mother Wanjiru Kingori and Wahome Kingori, the Respondents herein. The title had already been collected.

41. He had then reported the matter to the chief who had referred him to the District Officer who had inturn referred him to court where he had filed Civil Case No 52 of 1990. The court had then referred him back to the District Officer where the matter had been arbitrated upon. The award had been filed in court and a decree issued on the 13th June 1994 wherein he had been awarded the suit land and Kanyeki Kingori had been asked to return the title. When Kanyeki Kingori declined to return the title, it had been canceled through Gazette Notice No. 4037 of 22nd June 2001. whereupon decree was executed by the court and he had been issued with a new title No. 332 on the 16th January 2002.

42. That same year, the 2nd Respondent had cleared the land wherein a report had been made to the chief who had summoned both parties and informed the 2nd Respondent not to interfere with the land upon which the 2nd Respondent had signed an undertaking not to step onto the suit land. However on the 4th February 2004, when Kanyeki Kingori died, the Respondents had buried him on the suit land prompting the Appellant to file suit No. Nyahururu PMCCC 95 of 2004 to have the body exhumed. In 2005, Kanyeki Kingori's son, Kingori Kanyeki had also passed away wherein he too had been buried on the suit land prompting the Appellant to file another case being Nyahururu PMCCC No. 117 of 2005, to have the second body exhumed. It was the Appellant's case that the Respondents' actions herein were unjustified, illegal and unlawful and therefore actionable in law.

43. The Respondents'/Defendants' case on the other hand had been that Murugo Farmers Limited which was registered in 1965, was a company that used to purchase land for its members according to the shares held by each member. That each share was worth Ksh 500/=. That when the company was dissolved in 1992, each member share holder was issued with their titles according to their Share certificates. That in regard to plot No. 191, the same was issued to Kanyeki Kingori (deceased) who had 3 (three) share certificates. That those who did not get land were paid instead.

44. That Paul Muchiri Kibe was not known to the Society and neither was he a share holder of certificate No. 440. That if there was any sale of parcels of land issued by the society, the same had to be sanctioned by the society. In the case of plot No. 191, the same had not been sanctioned. That Kanyeki Kingori (deceased) did not sell his land. That he had lived on that land where he and his children were buried. The above was the summation of the matter in question before the trial court.

45. *Considering the evidence adduced in the trial court* I find the uncontested issues as being.

- i. That the Appellant herein had purchased the suit land vide an agreement dated the 18th February 1987.
- ii. That pursuant to the said Purchase, the deceased Kanyeki Kingori claimed ownership by virtue of a title deed issued on the 26 June 1992
- iii. That subsequently the matter had been referred for arbitration by the District Officer Rumuruti.
- iv. The finding of the elders, vide a letter dated the 9th December 1993, was that the deceased Kanyeki Kingori should surrender his title to the director for cancellation and the same reissued to the Appellant.
- v. There is also no doubt that the award was adopted in the Nyahururu PMCC No. 52 of 1990 as an order of the court on the 30th March 2000 wherein the deceased Kanyeki Kingori's title was cancelled and the Appellant was registered as proprietor of the suit land on the 16th January 2002.
- vi. That in the year 2004 and 2005 the bodies of both Kanyeki Kingori and his son Kingori Kanyeki were buried on the suit land respectively, pursuant to which the Appellant filed two suits, which were consolidated, seeking for orders herein enumerated.

46. Moving forward, I find that given the above scenario, the issues that arise for determination as being;

- i. Whether the Tribunal had the jurisdiction to pass the award it passed vide the letter dated 9th December 1993
- ii. Whether the trial Magistrate could question an award that had been adopted by a court of equal status.
- iii. Whether the Appellant is the registered owner of the suit land
- iv. Whether Respondents trespassed on the Appellant's parcel of land

47. On the first issue as to whether the Tribunal had the jurisdiction to pass the award it passed vide their letter dated the 9th December 1993, it is important to note that The Land Disputes Tribunals Act commenced on the 1st July, 1993 to limit the jurisdiction of magistrates' courts in certain cases relating to land; to establish Land Disputes Tribunals and define their jurisdiction and powers and for connected purposes. To this effect therefore we should look at the powers of the Tribunal as provided for under Section 3(1) of the repealed Land Disputes Tribunals Act which provides 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

48. The above section of the law does not vest any jurisdiction to the Tribunal to determine matters under the Registered Land Act, Cap 300 (now repealed) and specifically registered land. From the history of the issue herein above stated and the finding of the Land Dispute Tribunal thereafter, I find that the Tribunal had no jurisdiction to determine a matter which dealt with Kanyeki Kingori's title, a title which had been registered under the Registered Land Act, Cap 300 (now repealed).

49. The Appellant's case was that whereas the trial Court in PMCC 52 of 1990 quite rightly adopted the award of the Tribunal as the order of the court wherein he has issued with title to the suit land, the trial Magistrate in the present case had erred in law in failing to appreciate that he did not have jurisdiction to question the award made by the elders as well as the Judgment and decree issued by the court in Nyahururu SRMCC No. 52 of 1990. The Respondents on the other hand opined that the trial Magistrate was right in questioning the jurisdiction of the Tribunal which had acted beyond their jurisdiction.

50. In order to determine matters arising in this issue, it is important to understand the role of the Magistrate's Court in relation to adoption of awards from tribunals as provided for under the repealed *Land Disputes Tribunal Act*.

51. Once a Magistrate received an award from the Tribunal, (s)he was under a statutory duty to enter judgment in terms of the award and it was not open to her/him to alter, amend, question or set it aside. That is the plain meaning of Section 7 (2) of the repealed Land Disputes Tribunals Act which reads as follows:

“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”

52. The duty of the Magistrate in such a scenario has been re-affirmed in many cases including the case of **Peter Ouma Mitai vs. John Nyarara [2008] eKLR**, where **Musinga, J** (as he then was) following the decision in **Zedekiah M Mwale vs. Bikeke Farm Directors & Another [2004] eKLR** expressed himself as follows:

“The jurisdiction of the Land Disputes Tribunal is clearly set out in section 3 of the Land Disputes Tribunal Act. Once a Tribunal has determined a dispute, section 7(1) of the Act requires the Chairman to cause the decision to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the Tribunal....The provisions of section 7(2) of the Act are explicit as to what has to be done by the magistrate's court. That provision of the law does not leave any room for a magistrate to review, alter, amend or set aside the Tribunal's award. If any of the parties are aggrieved by the said award they can either prefer an appeal to the Appeals Committee as provided under section 8(1) of the Act or if there are reasonable grounds for challenging the decision by way of a judicial review application, proceed to institute such proceedings before the High Court and not otherwise.”

53. A reading of the proceedings in the trial court is that pursuant to the forwarding of the Tribunal's Award to the Magistrate in Nyahururu PMCC No. 52 of 1990, the same was adopted, in compliance with the provisions of Section 7 (2) of the repealed Land Disputes Tribunals Act. Indeed the Magistrate was under a statutory compulsion to enter judgment in terms of the award once (s)he received it from the chairman of the tribunal.

54. It was therefore not open to him/her to alter, amend, question or set aside the award so long as the court was satisfied that the same was on the face of it, issued by a proper Tribunal. The Magistrate was therefore under duty to adopt the award no matter how repugnant or unjust it was so that its adoption as a judgment of the court could now be followed by the usual process of decree and execution and appeal where the parties so desired. In the present case, the award was not challenged and the execution of the decree was effected where the Appellant herein registered as the proprietor of the suit land.

55. In the case of **Kenya National Examination Council vs Republic (Exparte Geoffrey Gathenji & Another Civil Appeal No.266 of 1996** the Court held that;-

“the order of certiorari can quash a decision already made as an order of certiorari will issue if the decision is made without or in excess of jurisdiction or when the rules of justice are not complied with...”

56. **Section 8(8)and(9) of the repealed Land Disputes Tribunal Act** provided as follows:

“(1) 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.

(8) The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any court.

(9) Either party to the appeal may appeal from the decision of the Appeal Committee to the High Court on a point of law within sixty days from the date of the decision complained of.

Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that court has certified that an issue of law (other than customary law) is involved.

57. The Act provided an elaborate procedure for resolution of disputes relating to the division of, or determination of boundaries to land, a claim to occupy or work land or trespass to land where jurisdiction was donated to a tribunal established under the Act and further established an appeal process for parties dissatisfied with determinations by such a tribunal. The Act limited the appeal to the High Court on questions of law only.

58. *The Tribunal having rendered its award in favour of the Appellant, the only two routes open to the Respondents was either to exhaust the appellate process under the Act, or seek, by certiorari, to quash the decision of the Tribunal. This was not done and the Appellant went ahead to execute wherein he was registered as proprietor of the suit land.*

59. It was therefore upon issuance of title to the Appellant and the filing of the present suit as proprietor of the suit land, to have the remains of Kanyeki Kingori and his son Kingori Kanyeki who were interred on the same exhumed, that the trail Magistrate had found that the award had been issued without jurisdiction.

60. There is no dispute that the award of the Tribunal was adopted as a judgment of the Magistrate's Court in Nyahururu SRMCC Award No.25 of 1990. The decree having been issued in the year 1994 on the basis of that judgment, the real issue was whether the award of the

Tribunal was still in existence on its own and whether it was capable of being quashed separately as it was done in the present scenario.

61. I find that since the award of the Tribunal was perfected into a judgment and a decree. It would not be possible to quash the award in its original form as it had been converted into a decree for enforcement by the Magistrate's Court.

62. Even if it were possible to surgically separate the award from the decree, it would be futile to quash the award while the resultant decree remains unchallenged.

63. In the decided case of case of **Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others [2014] eKLR**, the court of Appeal agreed with the finding of High Court at Kisii in High Court Civil Case No. 139 OF 2009 where *Makhandia, J held 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.”

64. Having found that the award issued by the Tribunal became a Judgment of a Court of competent jurisdiction, and since the same was not varied, vacated, set aside or reviewed by the same Court, or by an appellate Court, in appropriate proceedings, the Appellant herein had been installed as the proprietor of the suit land and his title was protected under the Registered Land Act (now repealed), and governed under the Land Act and section 26(1) of the Land Registration Act, 2012. The law is very clear on the position of a holder of a title deed in respect of land. Section 26(1) of the Land Registration Act provides as follows:

“the Certificate of Title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge, except –

a. On the ground of fraud or misrepresentation to which the person is proved to be a party

b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme.

65. I find from the above narrative, that the trial Magistrate herein erred in law in questioning the award made by the elders which award had already been adopted as a judgment by the court in Nyahururu SRMCC No. 52 of 1990 as (s)he lacked the jurisdiction of an appellate court in the circumstance.

66. Having found that the Appellant herein was the absolute and indefeasible proprietor of the suit land owner, and further having regard to the evidence tendered in the matter before the trial Magistrate's court, I find that the Respondents were wrong in interring the body of Kanyeki Kingori and his son Kingori Kanyeki in a land for which they had no interest in. Their actions were wrongful and amounted to trespass.

67. To this effect thereof, I find that the Appeal herein is merited and is hereby allowed with orders that the judgment and decree of the learned Acting Senior Principal Magistrate dismissing Nyahururu PMCC 95 of 2004 as Consolidated with Nyahururu PMCC No. 117 of 2005 is herein set aside and replaced with the following orders:

- i. That title No. Laikipia/Salama Muruku Block 1/332 (old No. 191) belongs to the Plaintiff herein absolutely’.
- ii. That the action of the Respondents herein in interring the remains of Kingori Kanyeki and Kanyeki Kingori (deceaseds) on title No Laikipia/Salama Muruku Block 1/332 (old No. 191)on 5/4/2005 was illegal.
- iii. The Respondents jointly and severally shall exhume the remains of the said Kingori Kanyeki and Kanyeki Kingori from title No. Laikipia/Salama Muruku Block 1/332 (old No. 191) and in default the Officer Commanding Police division (OCPD) Laikipia be directed and authorized to exhume the remains of Kingori Kanyeki and Kanyeki Kingori (deceased) from title No. Laikipia/Salama Muruku Block 1/332 (old No. 191) and have the same interred in any cemetery at the cost of the Respondents.
- iv. The Respondents shall pay costs of both this Appeal and the suit at the Magistrate's court together with the interest at court rates.

Dated and delivered at Nyahururu this 11th day of June 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE