



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L APPEAL CASE NO. 6 OF 2017**

**JOSEPH CHERUIYOT.....1<sup>ST</sup> APPELLANT**

**PETER CHERUIYOT.....2<sup>ND</sup> APPELLANT**

**KIMORONG MIBEI.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**WILSON BUSIENEI AND 19 OTHERS.....RESPONDENTS**

**JUDGMENT**

**INTRODUCTION**

On the 18<sup>th</sup> June 2002, the Chief Magistrate's Court, Eldoret, in Award No. 61 of 2002, between Wilson Busienei and 19 Others as plaintiffs and Kimorong Mibei and 2 Others as defendants, upon the matter coming up on 18.6.2002 for the reading of the Award before Miss P. Ngigi, Resident Magistrate in the presence of all the parties and upon reading the Soy Land Disputes Tribunal Award dated 31.12.2001, ordered and decreed that the award filed in the Chief Magistrate's Court on 26.4.2002 be adopted as the judgment of the court and the land parcels known as L. R. 8822, 6617 and 8637 were to be shared out between the parties to the suit in accordance with each person's contribution as per the list submitted to the Tribunal to wit;

- |                                   |   |   |
|-----------------------------------|---|---|
| <b>(a) KIMORONG MIBEI</b>         | - | <b>4.7 Acres</b>                                    |
| <b>(b) KIPNGETICH ARAP TANUI</b>  | - | <b>2.8 Acres</b>                                    |
| <b>(c) JOSEPH TUIGENY</b>         | - | <b>4.7 Acres</b>                                    |
| <b>(d) CLETI KIBOR ARAP MAGEN</b> | - | <b>8.9 Acres (70s)</b>                              |
| <b>(e) KITILI ARAP NAMGAT</b>     | - | <b>5.9 Acres (80s)</b>                              |
| <b>(f) CHEPSROR ARAP CHILILEI</b> | - | <b>7.0 Acres (died in the 80s)</b>                  |
| <b>(g) SUSANA CHEPKOSGEI</b>      | - | <b>6.4 Acres</b>                                    |
| <b>(h) KIPKEMBOI ARAP CHEBEN</b>  | - | <b>3.5 Acres (died in the 80s)</b>                  |
| <b>(i) TAB RANTICH KIPROTICH</b>  | - | <b>3.5 Acres</b>                                    |
| <b>(j) SURA BIN ABDALA</b>        | - | <b>4.1 Acres (70s)</b>                              |
| <b>(k) KIMELI ARAP BWALEI</b>     | - | <b>2.3 Acres</b>                                    |
| <b>(l) KIBITOK ARAP SAUREI</b>    | - | <b>3.0 Acres (died before ruling was delivered)</b> |
| <b>(m) KIPTOO ARAP KOECH</b>      | - | <b>1.4 Acres</b>                                    |

(n) KIBIRGEN ARAP CHEPKWALEI	-	1.4 Acres (70s)
(o) JOHN KIPKEMBOI KARONEI	-	5.9 Acres (92)
(p) KIPTARUS ARAP SABUL	-	2.8 Acres (died in the 70s)
(q) KIBAI ARAP BUSIENEI	-	1.2 Acres (2004)
(r) KIPTIONY ARAP RUGUT	-	3.5 Acres (2006)
(s) DAUDI SITIENEI	-	3.5 Acres (2004)
(t) CHEBWAMBOK ROP	-	9.4 Acres (1999)
(u) KIPROP ARAP RONO H	-	1.2 Acres
(v) KIPTOO ARAP MAGUT	-	2.8 Acres
(w) KIBITOK MITEI	-	0.25 Acres
(x) RUTH CHESEREM	-	0.25 Acres
(y) MITII KARANJA	-	0.25 Acres
(x) DEVELOPMENT	-	3.50 Acres

**PUBLIC FACILITIES**

**CHURCH /NURSERY SCHOOL.....1.0**

**DAM.....1.5**

**CEMETERY.....0.25**

**ROAD OF ACCESS.....3.0**

A decree was issued on the 15<sup>th</sup> December, 2006.

On the 31.5.2007, the matter went before Honourable Njage, Principal Magistrate for hearing of an application dated 29.1.2007 and upon perusal of the said application with the affidavit and the annexures thereof and upon hearing submissions from counsel for the parties and upon coming for ruling on 15.11.2007, it was ordered that the application dated 29.1.2007 be allowed and it was allowed thus, the subdivision so far done in relation to parcels known as L. R. Numbers 8822, 6612 and 8637 at the instance of the appellants herein was declared irregular, illegal, null, void and inconsistent with the decree issued on 15.12.2006 and the same was cancelled together with the deed plans drawn pursuant to the said subdivision and any other action that may have been taken after 2002.

The appellants now appeal to this court on grounds that the learned Magistrate erred in law and on facts in declaring that the subdivision in relation to parcels known as L. R. Numbers 8822, 6617, 8637 was irregular, illegal, null, void and inconsistent and that the learned Magistrate lacked jurisdiction to entertain the application dated 29<sup>th</sup> January, 2007 as the court was *functus officio* after the reading and adoption of the award on the 18<sup>th</sup> June, 2002.

Moreover, that the learned Magistrate erred in law and on facts in ordering the cancellation of title Deeds that had been issued long before the decree was issued and that the learned Magistrate erred in law and on facts in finding that the appellants herein were in breach of the decree issued on the 15<sup>th</sup> December, 2006.

The appellant further contends that the learned Magistrate erred in law and on facts in failing to consider the following material grounds namely that the issues raised in the application dated 29<sup>th</sup> January, 2007 leading to the ruling thereof now appealed against were res judicata and the same issues had been addressed conclusively in Eldoret High Court Civil Case No. 12 of 2002 and that the entire leasehold interest had been surrendered to the government and that the freehold interest was divided and sold off to other people not party to the lower court matters. That the decree issued on the 15<sup>th</sup> December, 2006 had long been over taken by events as the leasehold interest subject of the Land Disputes Tribunal decision ceased to exist. That the subdivisions were done way back in 1978 and 1988 hence the subdivisions and all duly issued under the registration of Titles Act.

**1<sup>st</sup>, 2<sup>ND</sup> AND 3<sup>RD</sup> APPELLANTS' SUBMISSIONS**

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants submit that it is incumbent upon the first appellate court in exercising its appellate jurisdiction to evaluate the

evidence afresh and to come to its own conclusions, but at the same time bearing in mind that the trial court had the advantage unavailable to it of seeking and hearing the witnesses.

In the case of ***Okeno —vs- Republic (1972) E.A.32***, it was held inter alia that it is the duty of a first appellate court to consider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld. The court held:

***"An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the an appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings can be supported"***

This Honorable court is therefore both mandated and expected to re-evaluate the evidence in the case that gave rise to this Appeal and to make its own findings as well as draw its own conclusions in the interest of justice and fairness. A cursory analysis of the appeal before court particularly the grounds therein, there are supplementary issues they would wish to draw the attention of the court to such as the litigation history of the matter and whether the matter is res iudicata.

According to the 2<sup>nd</sup> and 3<sup>rd</sup> appellant, the suit parcel of land has a long litigation history which cannot be wished away and for which the court should have the benefit of understanding its background. The suit parcels of land form part of the estate that was owned by one John Joseph Hughes who sold to six partners including the fathers of the appellants (who are now deceased). In the year 1978, the Government of Kenya sought to acquire the land from the six partners. An issue concerning the ownership of the land arose at which point the government deposited money in court vide HCC/MISC/344/79 money was later paid out and distributed in 1988 when the issue was amicably resolved.

That in 1999, H.C.C 150/99(OS), the appellants moved to this Honorable Court in a claim of adverse possession and obtained vesting orders in their favor concerning the land whose execution gave rise to title that the appellant now hold. The very titles the orders giving rise to the appeal seeks to void and or nullify. That also as humbly submitted by the counsel for the 1<sup>st</sup> appellant the matter was litigated that the High court vide ELDORET H.C.C NO. 12/2002, where the learned judge in dismissing the suit by the respondents observed ably that: -

***"The claim in its entirety indicated that it has its foundation almost 15 years ago and that even the claim which is alleged to have arisen in July 2001 cannot stand on its own without falling back on the plaintiff suppressed rights in 1970's."***

The Honorable Judge on this basis upheld the objection and dismissed the suit as time barred. The generality of the foregoing is that the court is invited to warm itself of the past litigation touching on the suit property and not allow the respondents an opportunity to mutate themselves and the claim and remerge with a fresh suit and have a second swipe at the cherry.

It is also argued that consent with lands bear's six (6) names and that as a follow up to this there are beneficiaries who have received substantial benefit from government. This compensation was part of the consideration in the interest that the Appellants hold over the suit property. Meaning that the portion the appellants hold would be smaller or otherwise different in size had it not been for the agreed mode of distributing the compensation. Noting that all this was in the public knowledge vide the various gazette notices perfecting the transactions.

They further submit that the orders of the court upon which the appeal lies, are materially defective and incapable of enforcement. This is founded on the fact that the order purports to revoke the titles over land parcels LR NO. 8822, 8637 and 6617. It is worth noting that these parcels even at the time of the filing of the dispute with the Land Disputes Tribunal at Soy no-longer existed and that to enforce the orders would mean reversing acquisition of the land by government in respect of 8637 and 6617. In view of the foregoing, they humbly submit that whereas the interest of the Appellants would lie in LR NO. 8822/415 titles they currently hold, it would be absurd for current residents of the entire Mwanzo Estate, Raiply and Kenya Pipeline to suffer consequence of proceedings for which they were not party to and neither had the opportunity to participate in the proceedings or tender their response to.

Lastly, that in a broader sense, the suit and the appeal had been overtaken by events rendering it a futile academic exercise. The titles the appellants currently hold are the product of a judicial process - ***Hcc No. 150/1999 Joseph Cheruiyot & 2 others vs John Hughes*** previously highlighted. Where this very court vested ownership over land parcel LR NO. 8822 on the appellants and therefore the Tribunal could not sit to appeal or vary the orders of this Honourable Court, neither could the magistrates court adopting the award.

In conclusion, they humbly submit that the trial Magistrate could not cloth himself with non-existent jurisdiction and attempt to go back through time and render far reaching orders not even within the contemplation of the dispute before court and the reliefs sought. The generality of the foregoing is that the appeal is merited, should be allowed and the orders of the Honorable Learned Magistrate be set aside with costs to the Appellants.

#### **RESPONDENTS SUBMISSIONS**

The respondents submit that In the Memorandum of Appeal herein filed on 14<sup>th</sup> December 2007, the appellants attached the ruling and Order of the Hon W.N Njage, Principal Magistrate in Eldoret CMC Award No. 61 of 2001. There are six grounds of appeal but looking at them closely, they are raising not more than three issues for determination by this honourable court. **According to the respondents**, the claim herein was first brought by the respondents herein against the appellants (some are now deceased) before the Soy Land Disputes Tribunal. In the case that was lodged in the year 2001, the respondents herein sought for the order that land parcels known as LR Numbers 8822, 8637 &

6617 be divided amongst 22 persons who were owners, after purchasing the parcels in the 1960s through a company/society known as Sangalo Estate. The respondents and appellants had been and are still living on the parcels since the 1960s. Some of the beneficiaries have since died but their families are still on the land and provisions are still available to them. The Tribunal heard the case and that both parties were heard. In the decision of the Tribunal dated 31<sup>st</sup> December 2001, the Tribunal ordered that the parcels be subdivided and each person allocated the size of land in accordance with their contributions, which was evidenced by receipts and list made available to the Tribunal. The appellants herein or their predecessors (parents) were also beneficiaries under the decision.

The Award was submitted to the Chief Magistrates Court at Eldoret and registered for adoption as Award No. 61 of 2001. The parties were notified and they attended court on 18<sup>th</sup> June, 2002 when the magistrate adopted the award as a judgement of the court, and decree was issued accordingly, as provided under S. 7(2) of the Land Disputes Tribunals Act 1990 (now repealed).

The appellants, feeling aggrieved by the decision of the Tribunal and the adoption of the same by the court, moved to the High Court (rightly) seeking judicial review of the decision and adoption. The judicial review application was filed at Eldoret High Court as Miscellaneous Civil Application No. 193 of 2003. However, the application was not properly before the court and upon objection by the respondent, the appellants withdrew the same with costs when it came before Justice Mohammed Ibrahim (then a High Court judge) on 14<sup>th</sup> November, 2006. The orders of stay which had been in force since 2003 were vacated, opening way for execution of the decree of the lower court.

The appellants herein did not appeal to the Provincial Appeals Committee as provided under s. 8 of the repealed Land Disputes Tribunals Act 1990.

However, the appellants were not done. They filed a fresh suit in the High Court at Nairobi: Nairobi High Court Civil Suit No. 77 of 2007, which was against the Soy Land Disputes Tribunal, the Attorney-General and the respondents (see pages 91-97 of the record of appeal herein). The suit sought to nullify the Award of the Tribunal on various grounds. Again, upon objection by the respondents, supported by the Attorney-General too, the suit was struck out with costs for being incompetent. In the decision dated 29<sup>th</sup> May 2007, Justice Mary Ang'awa advised the appellants that the only way to challenge the decision of the Tribunal would be by way of judicial review or appeal, and she graciously gave them 14 days to take appropriate action (though it was clear there was nothing much they could do as they were out of time for either option).

After the withdrawal of the judicial review application (on 14<sup>th</sup> November 2006) and the consequential lapse of orders of stay that had prevented the respondents from executing the decree of the court, the respondents embarked on the process to have the land parcels subdivided as per the decree. However, to their shock, they realized that while the appellants enjoyed stay orders in their favour from 2003 to 2006, they secretly started sub-dividing the land parcels in their own way, disregarding the decree.

Therefore, by application dated 29<sup>th</sup> January 2007, the respondents sought, in the court executing the decree, the following substantive orders namely:-

***"2. THAT there be stay of survey, subdivision, or any other or further process in relation thereto by the Respondents in relation to land parcels No. L.R. No. 8822, 6617 and 8637 pending the hearing and determination of this application.***

***3. THAT the subdivision so far done at the instance of the Respondents or any other person, be and are hereby declared irregular, illegal, null, void and inconsistent with the decree herein and the same be cancelled, together with the deed plans drawn pursuant to the said subdivisions, and any other action that may have been taken after 2002... "***

The above application was heard inter partes and by ruling dated 15<sup>th</sup> November 2007, the court (Mr. W. N. Njage, Principal Magistrate) found that the appellants herein had contravened the decree and hence allowed the above payers as prayed. The appeal before this court is against the above decision and orders, not the decree.

The decree of the court in Eldoret CMC Award No. 61/2001 clearly provided that the subject parcels be divided amongst all the owners in accordance with the contributions of each as evidenced in the list provided. The subdivisions done by the appellant had nothing to do with the decree. The appellants had done the subdivisions for their own benefit and excluded completely the respondents.

The respondents argue that the issue of surrendered to the Government of leasehold titles to land known as LR numbers 8822, 6617 and 8637 in exchange for absolute titles was never an issue before the magistrate although it was mentioned in the replying affidavit. No evidence was put before court on the question of surrender of titles. In any case, the appellant could not surrender titles which had been adjudicated to belong not to them alone but to the whole Sangalo Estate group. So, it is clear that the subdivisions that were contrary to the decree were irregular, null, void and in violation of the decree of the court and hence the trial magistrate found no difficulty to set them aside.

The respondent refers to s. 7(2) of the Land Disputes Tribunals Act 1990 (repealed by the Land Act 2012), which provides:

***"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. "***

and argues that the law is very clear that adoption makes the decision of the tribunal to be enforced like any other decree in accordance with the provisions of the Civil Procedure Act. The relevant provisions of the Civil Procedure Act are found in Part III of the Civil Procedure Act — sections 28-51 and in Order 22 (previously Order XXI).

The respondent moved the court under S. 34(1) of the CPA (which is part of the provisions of the CPA on execution of decrees). S. 34(1) provides:

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

This was the correct provision for the court to determine whether the decree is being executed in accordance with its terms or not. It is strange for the appellants to tell this court that the court cannot entertain an application under S. 34(1) of the CPA because it is *functus officio*. An application under this provision is not seeking to change the decision or the decree but only seeking for determination of "questions arising between the parties to the suit " The respondent submits that a court cannot become *functus officio* if there is something that it ought to do to complete the implementation of its order or decree.

On the allegation that the court erred in ordering the cancellation of title deeds that had been issued long before the decree was issued, the respondents argue that the decree arising out of the adoption proceedings is dated 18<sup>th</sup> June 2002. The appellant never submitted before the Magistrate any title deed resulting from the illegal subdivisions of the subject parcels. There are indeed no such documents in the record of appeal. There is no copy of title deed placed before court, which was issued before 18<sup>th</sup> June 2002, the date of the decree. At no time was the trial Magistrate required to cancel title deeds because none were before him. The order appealed against, dated 15<sup>th</sup> November 2007 does not cancel any title deed.

On Res judicata, it is alleged that the issues raised in the application dated 29<sup>th</sup> January 2007 raised same issues as those in Eldoret High Court Civil Case No. 12 of 2002. The appellants never put any decision before the court for the court to find on res judicata and that there is no indication as to who the parties were and the issues for determination. In any case, the orders sought in the application dated 29<sup>th</sup> January 2007 could not be res-judicata in another case which was not dealing with the decree in issue. That the leasehold interest had been surrendered: this has been addressed above, under (c) above.

The decree issued had not been overtaken by events as the decree is dated 18<sup>th</sup> June 2002. No title deed has been shown by the appellants to have been issued earlier than this date in order to claim that it came a little too late. The subdivisions were carried out in 1978 and 1988. A look at the subdivisions complained of clearly show that the deed plan effecting the subdivisions in issue is dated 26/11/2004, long after the date of the decree. In any case, the order appealed against only declared actions taken "after 2002" and does not affect decisions of 1978 or 1988, if at all there were any subdivisions then. According to the respondent, these grounds of appeal must also fail for lack of merit.

The respondents rely on High Court of Kenya at Nairobi (Family Division); Civil Suit No. 1 Of 2015; Jnm Versus Jnm [2015] eKLR. The court, while considering, inter alia, the meaning of the expression *functus officio*, quoted with approval the case of Jersey Evening Post Ltd v. Ai Thani (2002) JLR 542 at 550, thus:

***"A Court is functus [officio] when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available."***

According to the respondent, the Principal Magistrate was not *functus officio* as claimed by the appellants because the decree had not been executed. The concept of *functus officio* applies with respect to a particular judgment or order which cannot be altered by the court once it has been 'perfected' and delivered. In the current scenario, the court did not attempt to alter its order or decree, but was simply enforcing its order/decree.

The respondent further relies on **High Court At Busia: Civil Appeal No. 8 of 2012 Crispinus Nyongesa Ouna V. Wabwire Okonyoro & Others [2013] eKLR, where** the court stated that an award of a land disputes tribunal under the Land Disputes Tribunal Act 1990 ceases to exist as a decision and becomes a decision of the court. That such decision is executed as per S. 7(2) of the Land Disputes Tribunal Act 1990 as a decree of the court in accordance with the provisions of the Civil Procedure Act, Chapter 21. Quoting Khamoni J. in the case of **R v. Chairman Land Disputes Tribunal, Kirinpaga District & Another Ex parte Kariuki (2005) 2 KLR 10**. The Honourable judge had held:

***"... When a decision of the Land Disputes Tribunal has been adopted by a Magistrate 's court in accordance with the provisions of the Land Disputes Act, that adoption makes the decision of the tribunal or decision of the Appeals Committee, be a decision of the Magistrate 's court. Consequently, the decision of the Tribunal or Appeal Committee in Law, ceases to, exist as all independent decision challengeable in an appeal or juridical review."***

**[Pg.3 of the decision]**

Justice Kibunja concluded:

***"I find nothing wrong with their action as section 7 (2) of the then Land Disputes Tribunal Act allowed execution proceedings as provided for under the Civil Procedure Act after adoption by the court of the Tribunal award."*** [Pg.4 of the decision]

**In High Court at Kisii: Civil Case No. 266 Of 2012: Alfred Sagero Omweri V. Kennedy Omweri Ondieki [2015] eKLR.** The facts of this case were similar to those in the case before this court today. In deciding the above case, the High Court at Kisii (Justice Okong'o) said as follows:

***"The tribunal awarded to the defendant a portion measuring 5 acres of Plot No. 12. The plaintiff did not appeal against that decision of the tribunal to the Provincial Appeals Committee pursuant to the provisions of section 8 of the Act. The said decision***

was adopted by the Resident Magistrate 's Court on 18th June 2009 as a judgment of the court and an order (decree) was issued on the same date. Once the decision of the tribunal was adopted by the court, it became a judgment of the court and was executable as such. The plaintiff's attempt to challenge the decision of the tribunal and its adoption as a judgment of the court in the High Court thorough judicial review failed when his application for leave was dismissed by Musinga J. (as he then was) on 12th October 2009. It follows from the foregoing that the order or decree that was issued by the Resident Magistrate 's court following the adoption of the decision of the tribunal was not reviewed or set aside. That order has not been challenged in these proceedings and I have not been called upon to declare the same invalid or void. ... It is clear from the foregoing that under our legal system, an order or decree of a court of law is binding unless varied or set aside. " [Pg. 5 of the decision]

**In the High Court at Nyeri: Civil Appeal 103 Of 2003: Joseph Nderitu Wamathai V. Joseph Ndungu Njoroge & 2 Others [2007] eKLR.**

In this case, the court (Kasango J.) held that:

**"...because the lower Court's decree has never been set aside I find that the appeal must fail. The appeal on the ground that the lower Court erred in adopting the award which did not specify the amount of acreage each Respondent was to get is misconceived. The lower Court adopted the award of the Land Disputes Tribunal which specifically identified the acreage each Respondent was to get and which is the subject of the lower court's decree. Accordingly, the Appellant's appeal is found to be misconceived and is dismissed with costs to the Respondents. " [Pg. 3 of the decision]**

In the appeal before me now, the decree dated 18<sup>th</sup> June, 2002, which ordered the sharing of the land parcels has never been challenged. The Appellants want to challenge the decree through the back door by purporting to challenge an order made by the court in its capacity as the court executing the decree within the meaning of section 34 of the Civil Procedure Act.

### **ANALYSIS AND DETERMINATION**

I have considered the appeal, rival submission and do find that my duty at this point being the 1<sup>st</sup> appellate court in exercising appellate jurisdiction is to evaluate the evidence afresh and to come to my own conclusion save that I have no duty to evaluate the evidence before the Tribunal because the appeal is not an appeal from the Provincial Appeals' Committee (**as it then was**) to this court which would only be an appeal on points of law. This is an appeal from the Magistrate's Court on the enforcement of decree. However, I do bear in mind that the trial court had the advantage to hear the parties herein on the application dated 29.1.2007.

This court would take the earliest opportunity to point out that from the record of appeal herein, the appeal is not from the award of the Tribunal dated **31<sup>st</sup> December, 2001** and adopted on the **18<sup>th</sup> June 2002** and decree issue on **15<sup>th</sup> December 2006**, but it is an appeal from the ruling of the lower court in Award No. 61 of 2001 delivered on 15.11.2007 in respect of the application dated 29.1.2007 wherein the respondents sought an order that the subdivision that were done at the instance of the appellants were to be declared irregular, null, void and incompetent and inconsistent with the decree and therefore, the same was to be cancelled together with the deed plans drawn pursuant to the said subdivision and any action that may have been taken after 2002.

The application in the lower court was supported by the affidavit of Wilson Busienei whose gist was that while the matter was pending in court in 2003 – 2005, the appellants engaged a surveyor who subdivided the land in 15 portions contrary to the decree. The decree issued by the court therefore, has not been executed. The appellant on his/their part through Joseph Cheruiyot swore an affidavit in reply stating that the court became *functus officio* upon adopting the Award as a decision of the court. Moreover, they state that the land was not subdivided in 15 portions and that the entire leasehold was surrendered to the Government and that they bought the leasehold.

It is upon hearing the application That the Honourable Magistrate found, rightly I believe, that the applicant was merely asking the court to ensure that the decree was executed in terms that it was drawn and therefore, the matter was not *res-judicata* and therefore, the court was not *functus officio*. The learned Magistrate found that execution ought to proceed in terms of the decree.

I have read the ruling by the Honourable Magistrate and do find that the same did not set aside the award of the Tribunal, neither did it stay the execution of the decree nor reverse the said decree, it was an order that the decree be enforced as it was drawn. The appellants have not appealed to the Provincial Appeals' Committee and have not filed a judicial review application challenging the award of the tribunal which was adopted by the magistrate's court to quash the decree and therefore, the decree remains in force and has to be enforced to the letter and come as an order of the court.

I do find that the learned Magistrate did not err in declaring that the subdivision in relation to parcels known as L. R. Numbers 8822, 6617 and 8637 was irregular, illegal, null, void and inconsistent as the act of the appellants causing the land to be subdivided amongst 15 portions was inconsistent with the decree which clearly provided that the subject parcels be divided amongst all the owners in accordance with the contributions of each as evidenced in the list provided.

On whether the court was *functus officio*, I do find that as long as the court was enforcing the decree of the court, it was not *functus officio* and that the matter was not *res judicata*.

Section 7(2) of the Land Disputes Tribunal Act, 1990 (repealed by the Land Act, 2012), it is provided:

**"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."**

I agree with the respondent that the proper procedure for challenging the acts of the appellants in sub-dividing the suit land in disregard of

the court order, rather than filing a fresh suit, was to move the court under S. 34(1) of the Civil Procedure Act Cap 21 Laws of Kenya that provides for execution of decrees. S. 34(1) provides:

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

This was the correct provision for the court to determine whether the decree was being executed in accordance with its terms or not. The court was not *functus officio* as it was to ensure that its orders were executed.

In conclusion, I do find that the main decree of the lower court has not been set aside at all by any procedure recognized by law and therefore should be enforced to the letter and comma and that the appeal herein intends to revisit the decision of the tribunal which has already been adopted by the Magistrate's Court and has become the decision of the court and a decree has been extracted in accordance with the law. Any intention to revisit the decision of the Tribunal amounts to an appeal against that decision. The appeal therefore lacks merit and is otherwise dismissed with costs to the respondent.

**Dated and delivered at Eldoret this 9<sup>th</sup> day of February, 2018.**

**A. OMBWAYO**

**JUDGE**