



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 68 OF 2013

EUNICE MUTHONI GATUGI.....PLAINTIFF

VERSUS

LUSALIA WAMWERU

LUKA MATU

JOSPHINE WAMBUI (Sued on her own)

and on behalf of the Estate of

BINJETHO MURUMIA MATU

JOYCE WAWIRA

FAITH WANJIRU

MARGARET WANJIKU

PETERSON MUNENE

JACKSON NDEGE

JAMES KARIUKI

JOHN GICHIRA.....DEFENDANTS

JUDGMENT

EUNICE MUTHONI GATUGI (the plaintiff herein) is the registered proprietor of land parcel No. KABARE/NYANGATI/4148 (the suit land) since 8th September 2008 and in the same year, the 2nd to 11th defendants filed a reference being Arbitration Case No. 13 of 2008 before the **MWEA LAND DISPUTES TRIBUNAL** (the Tribunal) allegedly claiming the suit land from the 1st defendant. Notwithstanding the fact that the defendants and the Tribunal were aware that the suit land was in the names of the plaintiff, she was not made aware about the proceedings nor summoned and on 11th November 2008, the Tribunal cancelled the plaintiff's title and ordered that the family of the defendants benefit therefrom. The plaintiff only became aware of the reference in July 2009 and obtained proceedings from the Tribunal on 24th July 2009 and by then, the time within which to appeal or file Judicial proceedings had lapsed. The plaintiff also learnt that the 3rd defendant had lodged a caution against the title without the plaintiff's knowledge. It is the plaintiff's case that the award of the Tribunal and the subsequent order of the **WANGURU COURT** as its judgment was irregular, illegal, null and void. Particulars of the irregularity and/or illegality were pleaded in paragraph 7 of the plaint as follows:

- (a) Purporting to deal with a parcel of land registered in the names of the plaintiff without informing or involving her.***
- (b) Making orders adverse to the plaintiff in respect to the suit land without giving him an opportunity to be heard.***
- (c) Ordering the cancellation of the suit land registered under the Registered Land Act while it had no jurisdiction to do so.***

The plaintiff avers therefore that unless the award of the Tribunal is set aside, she stands to lose her property without being heard and in the

most irregular manner. She therefore sought judgment against the defendants in the following terms:

- 1. A declaration that the reference before the MWEA LAND DISPUTES TRIBUNAL between the 2nd to 11th defendants against the 1st defendant, the subsequent award and order of the WANGURU COURT adopting the award as a judgment of the Court directing the cancellation of title to the land parcel No. KABARE/NYANGATI/4148 in ARBITRATION CASE No. 13 of 2008 is irregular, illegal, null and void.**
- 2. An order setting aside the award of MWEA LAND DISPUTES TRIBUNAL and the subsequent order of WANGURU COURT adopting the award as judgment of the Court in ARBITRATION CASE No. 13 OF 2008.**
- 3. An order that the restriction lodged against the title of land parcel No. KABARE/NYANGATI/4148 be removed.**
- 4. Costs of the suit with interest.**

The 2nd to 11th defendants filed a joint statement of amended defence and a counter-claim against the 1st defendant in which they admitted the filing of the reference at the **MWEA LAND DISPUTES TRIBUNAL CASE No. 13 of 2008** but denied that the plaintiff was not informed adding that she was aware of the proceedings and even attended the Court when the award was read. They added that the 1st defendant obtained the title to the suit land fraudulently and illegally without the consent of the previous owner **BINJETHO MURUMIA MATU** (deceased) and therefore, she did not acquire a legitimate title to the suit land which she could pass to a third party particularly the plaintiff. They denied that the plaintiff would suffer any loss if the award is maintained adding instead that the award was proper as the suit land is family land which ought to revert to the Estate of the deceased for distribution to the entitled beneficiaries and that it was the 1st defendant who acquired the suit land fraudulently and illegally and therefore the transaction conferring proprietary interest thereon to the plaintiff was illegal and void.

The 2nd to 11th defendants pleaded further that the 1st defendant was the precursor of the fraud particulars of which were set out in paragraph fifteen (15) as follows:

- (a) Forging the signature and/or mark of BINJETHO MURUMIA MATU (deceased).**
- (b) Uttering a false document to the Land Registrar and purporting it to have been executed by the deceased.**
- (c) Failing to obtain the Land Control Board consent to transfer.**
- (d) Obtaining the original title deed from the Lands office without the consent and knowledge of the deceased through misrepresentation.**
- (e) Acquiring the registration of land title No. KABARE/NYANGATI/4148 without the consent of the owner with a view to deprive the legitimate owner of the property interest thereof.**
- (f) Transacting with the deceased's parcel of land without his consent with a view to defeat his proprietary rights.**

The 2nd to 11th defendants pleaded further that there is pending another suit between the plaintiff and the 10th defendant touching on the suit land being **KERUGOYA PMCC No. 249 of 2008**. The 2nd to 11th defendants therefore sought the dismissal of the plaintiffs suit and an order that the title No. KABARE/NYANGATI/4148 reverts to the Estate of the deceased **BINJETHO MURUMIA MATU**.

On her part, the 1st defendant filed a defence and reply to the 2nd to 11th defendants counter-claim in which she pleaded, inter alia, that she entered into a sale agreement with the plaintiff in respect to the suit land as she was the lawful owner thereof. She added that the deceased was her father in law who transferred the suit land to her after obtaining the necessary consent of the Land Control Board and on the same day, the deceased transferred land parcel No. KABARE/NYANGATI/4133 to one **LUKE MWANGI MACHARIA** who is in occupation thereof and the 2nd to 11th defendants have never challenged the transaction. The 1st defendant therefore denied in total the 2nd to 11th defendants' counter-claim and averred that she was the legitimate owner of the suit land which she transferred to the plaintiff and also wondered why the allegations of fraud itemized in paragraph fifteen (15) of the 2nd to 11th defendants' counter-claim had not been reported to the Police if they were true.

The plaintiff and the 1st defendant were the only witnesses in support of their respective cases while the 3rd, 7th and 9th defendants testified on behalf of the 2nd to 11th defendants.

The plaintiff testified that on 15th November 2007, the 1st defendant sold her the suit land measuring $\frac{1}{4}$ acre at a consideration of Ksh. 320,000 and they applied and obtained the necessary Land Control Board consent on the same day and on 8th January 2008, she was registered as the owner thereof. She added that there were no inhibitions on the suit land but later, she learnt that there had been a dispute at the Tribunal where the 2nd to 11th defendants had sued the 1st defendant over the suit land after she had already bought it. The Tribunal ordered that the title to the suit land revert to the family of the 2nd to 11th defendants. That award was adopted in **WANGURU COURT ARBITRATION CASE No. 13 of 2008**. She therefore filed **KERUGOYA PMCC No. 249 of 2008** against the 10th defendant stopping him from burying his father (the deceased herein) on the suit land and the Court granted her that order.

She then learnt about the Tribunal proceedings in July 2009 and filed this suit seeking the orders therein. She urged the Court to grant her

orders as per her plaint and sought the dismissal of the 2nd to 11th defendants counter-claim on the basis that she obtained the title to the suit land properly and that the defendants are on it illegally by force.

The 1st defendant **LUSALIA WAMWERU NJOKA** testified that she was given the suit land by her father in law (the deceased) who transferred it to her voluntarily during his life time after obtaining the necessary Land Control Board consent. Since the suit land was small and she had children, she sold it so that she could buy bigger land elsewhere. Later, the defendants filed a suit at the Tribunal alleging that she had obtained the suit land fraudulently which was not true. The Tribunal then proceeded to order that the title thereto be cancelled.

The 3rd defendant (**JOSEPHINE WAMBUI**) told the Court that the 1st defendant is her sister in law being wife to her deceased brother **JEREMIA NJOKA**. That the suit land belonged to her deceased father. She disputed the claim that deceased gave the 1st defendant the suit land and added that the pictures appearing on the application for Land Control Board consent were neither of the deceased or the 1st defendant and further, that the thumb print appearing thereon did not belong to the deceased because he had gone to school and could write. She also added that the consent bore the names of the deceased as **BINJETHO MURUMIA MATU** yet the deceased was called **BINJERO MURUMIA MATU**. She therefore told the Court that the transfer of the suit land to the 1st defendant was fraudulent since the deceased could only be assisted to walk following an accident and used to be carried by **MARGARET WANJIKU** who was living with him. Therefore, the deceased could not have gone to the Land Control Board without the defendants' knowledge and further, he had even lost his memory. She insisted, therefore, that the 1st defendant could not have been given the suit land by the deceased and sought that it reverts to his Estate as per the counter-claim.

MARGARET WANJIKU (the 7th defendant) testified that during the period between 2005-2008, she was living with the deceased who was bed-ridden following an accident and since the 1st defendant could not take good care of him, the family agreed that she takes that responsibility. She added that the deceased had given each of his children ¼ acre of his land while the 1st defendant and her late husband were given 1 ½ acres which they sold. It was her evidence that wherever the deceased wanted to transfer land, he would be accompanied to the Land Control Board by the whole family and therefore the transfer of the suit land to the 1st defendant was improper.

JACKSON NDEGE the 9th defendant told the Court that at no time did he accompany the 1st defendant and the deceased to the Land Control Board for purposes of having the suit land transferred to her.

Submissions have been filed both by **MR. KAGIO ADVOCATES** for the plaintiff and **MR. MAHINDA ADVOCATES** for the 2nd to 11th defendants. 1st defendant filed no submissions.

Since the 2nd to 11th defendants pleaded that there is **KERUGOYA PMCC No. 249 of 2008** pending at this Court, I called for the file and found that it was infact withdrawn on 20th January 2009 and is not therefore pending.

I have considered the parties oral and documentary evidence as well as the submissions by counsel.

The plaintiff's case is that the Tribunal's award cancelling her title to the suit land was irregular and is illegal, null and void for lack of jurisdiction and also because she was not given an opportunity to be heard. That award and the order of the Court at **WANGURU** adopting it should be set aside. The 1st defendant's case is that the suit land was gifted to her by the deceased during his life time while the case of the 2nd to 11th defendants is that infact the 1st defendant obtained title to the suit land fraudulently and without the consent of the deceased and could therefore not pass any title to the plaintiff or any third party. They therefore seek that the title to the suit land reverts to the Estate of the deceased.

In my view, the following three (3) issues are crucial in the determination of this suit:

- 1. Did the 1st defendant acquire a valid title to the suit land from the deceased which was then properly passed to the plaintiff?*
- 2. Was the acquisition of the title to the suit land by the 1st defendant fraudulently obtained?*
- 3. Did the Tribunal act within its jurisdiction in ordering the cancellation of the plaintiff's title to the suit land?*

Before I canvass those issues however, there is an important issue raised in the submission by counsel for the 2nd to 11th defendants and which, in my view, ought to have been raised as a Preliminary issue as it goes to the Court's jurisdiction to determine the suit. It is **MR. MAHINDA**'s submission that under the repealed **Land Disputes Tribunals Act**, the only avenue left to the plaintiff was to file an appeal against the decision of the Tribunal and that this suit is improper since it attempts to appeal the decision of the Tribunal and award of the Court at **WANGURU** through the back door. Counsel has referred me to my own decision in the case of **ALICE MWERU NGAI VS K.P & L.C LTD 2015 e K.L.R** where I stated as follows:

“Where the law has granted jurisdiction to other organs of government to handle specific grievances, the Courts must respect and up-held the law and allow the said remedies to be exhausted. In view of the clear legal provisions cited above and which stipulate the forum that ought to deal with a dispute of this nature and which forum the plaintiff has not approached as a first point of call, it would be an un-warranted intrusion into the jurisdiction of another organ if this Court were to purport to handle this dispute. It is in the interest of proper, orderly and efficient administration of justice that proper procedures provided for in the hierarchy of dispute resolution be followed and that organs mandated to arbitrate over such disputes be respected and allowed to perform their statutory responsibilities”.

Counsel for the 2nd to 11th defendants similarly drew my attention to the case of **FLORENCE NYABOKE MACHANI VS MOGERE AMOSI OMBUI AND TWO OTHERS C.A CIVIL APPEAL No. 184 of 2011 (KISUMU)** where the Court is quoted as follows:

“..... it is trite law that a valid judgment of a Court unless over-turned by an appellate Court remains a judgment of the Court enforceable the issue of jurisdiction notwithstanding. The plaintiff had all avenues to impugn the award as well as the judgment”.

Those two cases, in my view, do not aid the 2nd to 11th defendants' case and are clearly distinguishable from this case for the following reasons:

In the **ALICE MWERU NGAI** case (supra), the plaintiff had signed a way leaf agreement authorizing the defendant to erect power lines on her land and she was compensated for the damage to her crop. She was however dissatisfied with the said compensation and moved to Court yet under **Section 48 (2) of the Energy Act**, only **Energy Regulatory Commission** had the jurisdiction to assess the amount of compensation payable and not the Court. The Court therefore declined jurisdiction for the reasons cited above. In this case however, the plaintiff has pleaded that she was not aware that the Tribunal had cancelled the title to the suit land and by the time she became aware, time to appeal or file Judicial Review had lapsed. Further, it is the plaintiff's case that the order cancelling her title to the suit land was arrived at by a Tribunal that had no jurisdiction and which therefore rendered the decision null and void. Similarly, in the **FLORENCE NYABOKE MACHANI** case (supra), there was a specific finding that the judgment being impugned was ***“valid”*** and could not therefore be questioned through ***“the remedy of the declaration”***. In this case before me, the propriety of the Tribunal's award and the resultant judgment are being questioned for their validity due to want of jurisdiction. The plaintiff was therefore entitled to move to this Court as she has done. A similar scenario obtained in the case of **JOHANA NYOKWOYO BUTI VS WALTER RASUGU OMARIBA C.A CIVIL APPEAL No. 182 of 2006 (2011 e K.L.R)** where the Court held as follows:

“Moreover, although the Resident Magistrate's Court entered judgment in accordance with the decision of the Tribunal, such a judgment could be challenged in fresh proceedings if obtained by fraud or mistake etc – see paragraph 1210 of HALSBURY'S LAWS OF ENGLAND 4TH EDITION - Re-issue Page 35. In JANESCO VS BEARD 1930 A.C. 293, the House of Lords held that the proper method of impeaching a complete judgment on the ground of fraud is by action which decision was followed in KUWAIT AIRWAYS CORPORATION VS IRAQI AIRWAYS & ANOTHER (No. 2) (2011) 1 WLR 429. The decision of the Tribunal had of course been merged in the judgment of the magistrate's Court”

The Court then goes on to state as follows:

“It seems to us that the 1st Respondent had no other remedy. Since the superior Court had jurisdiction to entertain both a declaratory suit and an ordinary suit impeaching the judgment of the Magistrate's Court, the Preliminary Objection was not maintainable. It is after hearing of the suit that the superior Court can determine whether or not to grant a declaration in the circumstances of the case”.

It must therefore be clear from the above that the submission by counsel for the 2nd to 11th defendants questioning this Court's jurisdiction cannot be valid.

I shall now consider the three (3) issues set out above.

With regard to issues No. 1 and 2, it is the case of the 2nd to 11th defendants that the 1st defendant obtained title to the suit land through fraudulent and illegal means particulars of which have been itemized in paragraph fifteen (15) of the amended defence. Consequently, no good title passed to the plaintiff. **Section 26 (1) of the Land Registration Act 2012** is of course clear that a title obtained through fraud, misrepresentation, illegally, un-procedurally or by corrupt means can be challenged and cancelled. That is the remedy that the 2nd to 11th defendants seek in their counter-claim. Having pleaded fraud and illegality on the part of the 1st defendant in the manner in which she obtained the suit land, the onus was on the 2nd to 11th defendants to prove those allegations. Fraud is a serious matter which must be proved to the required standard. In **R.G PATEL VS LALJI MAKANJI 1957 E.A. 314**, the Court of Appeal stated as follows:

“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.

And in **ARTHI HIGHWAY DEVELOPERS LTD VS WEST END BUTHERY LTD AND OTHERS C.A CIVIL APPEAL No. 246 of 2013 (2015 e K.L.R)**, the Court of Appeal cited the following passage from **BULLEN & LEAKE PRECEDENTS PLEADINGS 13TH EDITION** at Page 427:

“The statement of the claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.

I have no doubt in my mind that the 2nd to 11th defendants have distinctly pleaded the facts on which fraud is alleged against the 1st defendant. The next step however was to prove those allegations to the required standard. I will therefore interrogate all those allegations of fraud. Illegality and misrepresentation as pleaded in paragraph fifteen (15) of the amended defence:

(a) Forging the signature and/or mark of BINJETHO MURUMIA MATU (deceased)

The evidence of the 3rd defendant **JOSEPHINE WAMBUI** with respect to this allegation was that the deceased had gone to school and could write and therefore the thumb print appearing on the application for consent of the Land Control Board could not be his and further, that the pictures appearing on the said application were neither the deceased's nor the 1st defendant's. The witness also added that the deceased was called **BINJERO MURUMIA MATU** and not **BINJETHO MURUMIA MATU** as appears in the application form. It is common ground that prior to its transfer to the 1st defendant in 2006, the suit land was registered in the names of the deceased, who according to the Green Card, was **BINJERO MURUMIA MATU** of **ID No. 2917852**. No other person owned that land and therefore the reference to **BINJETHO MURUMIA MATU** in the application for consent can only be a typing error. In any event, no other person has come forward claiming the suit land and bearing similar names. And with regard to the allegation that the deceased could write and therefore the thumb print is not his, that is a fact that could only be proved by the evidence of an expert witness in the nature of a forensic document examiner. No such witness was called by the 2nd to 11th defendants in proof of that allegation. On the allegation that the picture on the transfer form is not the deceased's, it would be difficult for this Court to make a decision one way or the other as it did not have the benefit of seeing the deceased and no other picture was placed before this Court other than the ones on the documents. As the provisions of **Section 107 to 109 of the Evidence Act** place the onus of proof on the 2nd to 11th defendants, it was their duty to do so. They have not done so and therefore that allegation remains un-proved.

(b) Uttering a false document to the Land Registrar and purporting it to have been executed by the deceased.

For the same reason as in (a) above, this allegation remains un-proved. Without proof that the application for the Land Control Board consent was forged, an allegation of uttering a false document cannot be up-held. That allegation similarly remains un-proved.

(c) Failing to obtain the Land Control Board's consent to transfer:

Among the documents produced by the 1st defendant is the letter of consent dated 14th June 2006 to transfer the suit land from the deceased to the 1st defendant by way of a Gift. That allegation is therefore not proved.

(d) Obtaining the original title deed from the Land office without the consent or knowledge of the deceased through misrepresentation.

Again there was no evidence, direct or otherwise led by the 2nd to 11th defendants to prove that allegation.

(e) Acquiring the registration of title No. KABARE/NYANGATI/4148 without the consent of the owner with a view to deprive the legitimate owner of the property and interest thereof.

In her statement filed in Court, the 1st defendant stated that on 14th June 2006, she accompanied the deceased to the Land Control Board where consent to transfer the suit land to her was granted. She added further that on the same day, consent of the Board was also granted to the deceased to transfer land parcel No. KABARE/NYANGATI/4133 to one **LUKE MWANGI MACHARIA** who took possession. In her evidence in chief, the 3rd defendant was categorical that the deceased could not have gone to the Land Control Board. She said:

“So the transfer was done fraudulently. Our late father could not have gone to the Land Control Board because he had an accident and could only walk by assistance. He used to be carried by our sister Margaret Wanjiku who was living with him. So it is not possible that he could have gone to the Land Control Board without our consent”

When she was cross-examined by counsel for the plaintiff, she said:

“I don't know Luke Macharia. I don't know land parcel No. KABARE/NYANGATI/4133. I only know about the land subject to this case. I am not aware that at the same time the suit land was transferred to the 1st defendant, land parcel No. KABARE/NYANGATI/4133 was also transferred to Luke Macharia”

When the same was put to the 7th defendant **MARGARET WANJIKU** (DW3) she stated that:

“But I know that on 14.6.2006, my father was at the Land Control Board when land was being transferred to Luke Macharia”

On his part, the 9th defendant **JACKSON NDEGE** (DW4) appeared to contradict his siblings' evidence. This is what he said in cross-examination by counsel for the plaintiff:

“The land I was selling was still in my late father's names although he had given me. So the transfer used to be from my father to the buyer although it was mine. Land parcel No. KABARE/NYANGATI/4133 was transferred to Luke Mwangi Macharia before our late father had been involved in an accident. So my evidence is that as per 14.6.2006 when the suit land was transferred by my late father, he was in good health”

When he was re-examined by his own counsel however, this is what he said:

“It is not true that I went to the Land Control Board with the 1st defendant on 14.6.2006. I am not aware that my late father

gave the 1st defendant the land subject of this suit”.

All the above contradictions taken together with the documentary evidence herein can only be resolved in favour of the 1st defendant by making a finding, which I hereby do, that the deceased voluntarily transferred the suit land to the 1st defendant as a gift during his life time. That allegation is therefore un-proved.

(f) Transacting with the deceased parcel of land without his consent with a view to defeat his proprietary rights:

Again, and for the same reasons given in (d) and (e) above, this allegation has not been proved.

The totality of all the above is that whereas the 2nd to 11th defendants have pleaded the allegation of fraud, misrepresentation and illegality against the 1st defendant in the manner in which she acquired title to the suit land, none of the allegations have been proved and there is no basis upon which I can order that the suit land reverts to the Estate of the deceased. Instead, I find that the 1st defendant obtained a proper title to the suit land which she subsequently passed to the plaintiff. That acquisition was neither fraudulent, illegal or through misrepresentation.

3. Did the Tribunal act within its jurisdiction in ordering the cancellation of the plaintiff’s title to the suit land?

In its award which was adopted as a judgment of the **WANGURU SENIOR RESIDENT MAGISTRATE’S COURT ARBITRATION CASE No. 13 of 2008**, the Tribunal made the following order:

“Award

The Mwea Land Disputes (sic) has therefore awarded as follows:

The land in question KABARE/NYANGATI/4148 is a family land and should benefit every member of the family of Mr. Murumia and not one single person. The purported transfer of the land should be revoked and the title deed cancelled for it was obtained fraudulently”

It is not within the province of this Court to question the merits or otherwise of that award. The legal position however is that in exercise of its powers as donated by Section 3 of the repealed Land Disputes Tribunal Act, the Tribunal had no jurisdiction to order the cancellation of title to registered land no matter how noble its intention were. And since the suit land was registered under the repealed Registered Land Act, the Tribunal could not cancel the plaintiff’s title thereto as it purported to do and by so doing, it acted beyond its jurisdiction. That position has been restated by the superior Courts in several cases including:

1. JOTHAM AMUNAVI VS THE CHAIRMAN SABATIA LAND DISPUTES TRIBUNAL & ANOTHER C.A CIVIL APPEAL No. 252 of 2002 (KISUMU)

2. JOSEPH MALAKWEN LELEI & ANOTHER VS RIFT VALLEY LAND DISPUTES APPEALS COMMITTEE & OTHERS C.A CIVIL APPEAL No. 82 of 2006 (ELDORET) 2014 e K.L.R.

In the JOSEPH LELEI case (supra), the Court of Appeal citing MACFOY VS UNITED AFRICA CO. LTD 1961 3 ALL ER 1169 went on to state as follows:

“..... It is trite that where a Court or tribunal takes upon itself to exercise a jurisdiction which it does not possess, its proceedings and decisions are null and void. It then follows that every other proceeding, decision or award that results from such a process must be construed as a nullity”

It follows therefore that the award by the Tribunal cancelling the plaintiff’s title to the suit land and the subsequent order in WANGURU ARBITRATION CASE No. 13 of 2008 adopting it were all made in excess of jurisdiction and are a nullity which this Court must set aside.

But that is not the only ground upon which the Tribunal’s award and the subsequent order made in **WANGURU ARBITRATION CASE No. 13 of 2008** can be impeached. It is common ground that since 14th January 2008, the plaintiff was the registered proprietor of the suit land. It is not clear when the reference was filed at the Tribunal but its award bears the date of 29th September 2008. The record of the proceedings before the Tribunal shows that the fact that the suit land had been sold by the 1st defendant was brought to its attention by the 8th defendant **PETERSON MUNENE** who is recorded as having said the following:

“Now the most surprising thing is that she has sold the plot she was to occupy temporarily and we understand that from the area Chief that she has bought another land elsewhere. We have been going to the Lands office and now we have an official search indicating that the land in question was sold”

That was also confirmed by the 1st defendant who testified that she sold the suit land in order to purchase land elsewhere since her life was in danger. The Tribunal was therefore aware that the suit land was no longer the property of the 1st defendant but had been sold to a third party who is the plaintiff herein. However, no attempt was made to summon the plaintiff and give her an opportunity to be heard before cancelling her title to the suit land. Although the 2nd to 11th defendants have pleaded in paragraph four (4) of their defence that the plaintiff *“was well aware of the proceedings and even attended the Court during the reading and adoption of the award in Court at Wanguru”*, a perusal of

the Tribunal's proceedings during the hearing and also those of the **WANGURU COURT** on 11th November 2008 when that award was adopted as a judgment of the Court clearly show that the plaintiff was not a party in both forums. The result was that the plaintiff's right to the suit land was arbitrarily infringed without hearing her. That not only violated her Constitutional right to own property protected by **Article 40** but was also against the **Rules of Natural Justice** in that she was condemned un-heard. A decision arrive at in violation of the **Rules of Natural Justice** is ultra vires, null and void. Similarly, **Article 47 (1) of the Constitution** provides that:

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”
Emphasis added

Article 50 (1) of the Constitution is also relevant as it states that:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body” Emphasis added

It is clear therefore that whereas the 2nd to 11th defendants have failed to establish their counter-claim against the plaintiff, the plaintiff has on the other hand demonstrated that orders adverse to her were made by the Tribunal and adopted as a judgment of the Court in excess of jurisdiction and without giving her an opportunity to be heard. Those orders must therefore be set aside.

Ultimately therefore, there shall be judgment for the plaintiff against the 2nd to 11th defendants in the following terms:

- 1. A declaration that the reference before the MWEA LAND DISPUTES TRIBUNAL between the 2nd to 11th defendants against the 1st defendant and the subsequent award and order of WANGURU LAND COURT adopting the award of the Tribunal as a judgment of the Court directing the cancellation of title to land parcel No. KABARE/NYANGATI/4148 in ARBITRATION CASE No. 13 of 2008 is irregular, illegal, null and void.**
- 2. An order setting aside the award of MWEA LAND DISPUTES TRIBUNAL and the subsequent order of WANGURU LAND COURT adopting the award as a judgment of the Court in WANGURU ARBITRATION CASE No. 13 of 2008.**
- 3. An order that the restriction lodged against the title to land parcel No. KABARE/NYANGATI/4148 be removed.**
- 4. The 2nd to 11th defendants counter-claim is dismissed.**
- 5. As the majority of the parties herein are family and in order not to further set them up against each other, the order that commends itself to me on costs is that each party meets their own costs.**

B.N. OLAO

JUDGE

2ND FEBRUARY, 2018

Judgment dated, delivered and signed in open Court at Kerugoya this 2nd day of February 2018

Both counsels absent

Plaintiff present

1st Defendant present

2nd to 11th Defendants absent

Right of appeal explained.

B.N. OLAO

JUDGE

2ND FEBRUARY, 2018