REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 54 OF 2017

GITAU KAMAU.....PLAINTIFF

VERSUS

NDUNGU KAMAU.....1ST DEFENDANT

THE CHIEF MAGISTRATE'S

COURT AT THIKA.....2ND DEFENDANT

JUDGMENT

1. On the 15/10/15 the Plaintiff filed suit against the Defendants seeking the following declaratory orders interalia:

a) The Honourable Court do issue a declaration that the award of Maragua Land Dispute Tribunal in Case No. 169 of 2005 was and is illegal, unlawful, null and void.

b) The Honourable Court do issue a declaration that the award of Central Provincial Appeals Land Tribunal in claim No. 8 of 2006 Maragua was and is illegal, unlawful, null and void.

c) That the Honourable Court do issue a declaration that the decree issued by the 2nd Defendant on 18th October, 2010 was and is illegal, unlawful, null and void.

d) That the Honourable Court do issue a declaration that the Plaintiff owns 1.8 Acres out of LR Loc.4/Muruka/400 absolutely.

e) The Honourable Court be pleased to determine the trust in 1.8 Acres out of LR. Loc.4/Muruka/400 as follows;

i. Ndung'u Kamau

ii. Wangoru Kamau

iii. The Plaintiff

iv. The Defendant

f) The Plaintiff be awarded costs of this suit.

2. Whilst opposing the Plaintiffs suit the 1st Defendant stated that, the suit is an abuse of the Court process and is incompetently before the Honourable Court. The 1st Defendant denied that the Plaintiff is the absolute owner of the suit land and avers that the suit land is family land.

3. The 2nd Defendant did not enter appearance nor file any defence. The suit against the 2nd Defendant is undefended.

The case of the Plaintiff.

4. According to the evidence of the Plaintiff on record he is the absolute proprietor of all that Land Loc.4/Muruka/400 measuring 3.6 acres which he acquired as follows; bought 0.9 Acres from Kanyoru Githae and inherited 2.7 acres from his father Kamau Njogu. That out of 2.7 acres, his Uncle Daniel Gitau alias Mukurino laid a claim on 0.9 acres, which he successfully litigated and reclaimed. That the lands were

amalgamated to form Loc.4/Muruka/400.

5. He pleaded that in 2005 the Maragua Land Dispute Tribunal case No. 169/2005 awarded the 1st Defendant 1.8 acres out of the suit land. On appeal, the Provincial Lands Appeals Tribunal upheld the Land Dispute Tribunal award. The 2nd Defendant adopted the award as the judgment of the Court. Thereafter he filed a JR 277/2009 but was withdrawn. On advice of legal counsel, he filed Petition No. 4 of 2011 challenging the Land Dispute Tribunal award but was dismissed on technicality. Next, he filed an originating summons ELC No. 273 of 2014 at Kerugoya, which again was withdrawn before it saw the light of day.

6. The Plaintiff further avers that the Land Dispute Tribunal and Provincial Land Dispute Tribunal lacked jurisdiction to determine a claim on trust under the then Land Dispute Tribunal Act 18 of 1990 (now repealed). That the two tribunals were devoid of authority to impeach title to the suit land.

7. The Plaintiff states that he holds 1.8 acres out of the suit land in trust for himself, the Defendant, Ndung'u Kamau & Wangoru Kamau. While 1.8 acres belongs to him absolutely.

8. The Plaintiff informed the Court that the 1st Defendant is his step-brother but Ndung'u Kamau and Wangoru Kamau are his brother and sister respectively. That his father had 2 wives: he came for the house of the 1st wife (house).

The case for the 1st Defendant

9. The 1st Defendant stated that the Plaintiff is his stepbrother. Their father Kamau Njogu who died before the emergency had 2 wives. The 1st wife was Njoki and 2nd wife was Tabitha Wanjiku. The Plaintiff is the son of the 1st wife while the 1st Defendant is of the second wife. The 1st wife had 4 children while the 2nd wife had 5 children.

10. It is his evidence that the suit land is both ancestral and family land as it belonged to their father. The land became registered in the name of the Plaintiff as trustee during land consolidation as their father had passed on by then.

11. He stated that the suit has been subject to many suits to wit: Land Dispute Tribunal No 160 /2005 and Provincials Appeals Tribunal No. 8 of 2006 and likewise the current suit is an abuse of the process of the Court and should be dismissed with costs.

12. In denying the Plaintiffs claim, he averred that the land should be shared in equal shares of 1.8 acres each in respect to the Plaintiff to hold in trust for the 1st house and the 1st Defendant to hold on behalf of the 2nd house.

13. Further, he stated that he and the Plaintiff together with their children live on the suit land. That the 0.9 acres that the Plaintiff alleged to have reclaimed from Gitau Mukurino is part of their family land. That he also contributed towards the expenses of the case until a point when he could not raise any more money and in any event the Plaintiff has not asked for any refunds from him. In respect to the Plaintiff's claim that he bought 0.9 acres from Kanyoru Githae, the 1st Defendant informed the Court that the allegations are without any legal basis for want of any documentary evidence to support the purchase, if any. That the Plaintiff lives on 1.8 acres and the 1st Defendant on the other 1.8 acres of land respectively.

14. Parties elected to file written submissions, which have been duly considered.

15. The Plaintiff submitted that the issue of resjudicata was sufficiently determined by this Court in its ruling rendered on 17/3/17 when the Court held that the suit was not resjudicata because the judgement of the Chief Magistrates Court emanating from the Land Dispute Tribunals had no jurisdiction to determine rights in land.

16. The Plaintiff argued that he bought 0.9 acres from Kanyoru Githae in 1964. The land in the area was demarcated in 1965 and that explains why the Sale Agreement does not contain the Land reference number. That the family land was consolidated in 1965. He submitted that he bought the 0.9 acres from Kanyoru and reclaimed 0.9 acres from his uncle (part of 2.7 acres held in trust for his father and family). The 3 portions were consolidated and registered in his name compromising of 3.6 acres of LR No. Loc.4/Muruka/400.

17. In response to the 1st Defendant's assertion that the Sale Agreement in respect to 0.9 acres by the Plaintiff is null and void, the Plaintiff argued to the contrary that since he is illiterate, the agreement as presented should be taken as testamentary evidence of the sale. In any event none of the witnesses are alive including Kanyoru himself hence no witness to corroborate. He submitted that the equitable maxim of equity looks at "that as done which ought to be done" is applicable to the said agreement between the Plaintiff and Kanyoru Githae and the 1st Defendant would be incompetent to question the same as it bound the parties to the transaction.

18. The Plaintiff submitted that the awards of the Land Dispute Tribunal, Provincial Appeals Tribunal and the Decree by the Chief Magistrate's Court at Thika were null and void for want of jurisdiction pursuant to Section 3(1) of the Land Dispute Tribunal Act No. 18 of 1990 (now repealed). The Tribunals had no jurisdiction to determine rights over title or ownership of land. To support the above position the Plaintiff cited the following case;

(a) **Jonathan Amunavi vs The Chairman Sabatia Division Lands Dispute Tribunal & Another, Kisumu Civil Appeal No. 256 of 2002(unreported)** where the Court observed that the land dispute tribunal acted in excess of jurisdiction when it purported to revoke the Plaintiff's title to the suit property. It went ahead to affirm that such power was reserved for the High Court vide Section 159 of the Registered Land Act Cap 300 Laws of Kenya (now repealed).

(b) **Sir Ali Bin Salim –vs- Shariff Mohamed Shatry Civil Appeal No. 29 of 1940** where the East African Court of Appeal stated,

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

19. The Plaintiff submitted that he is the indefeasible owner of the suit land, being the 1st registered owner. He wants the Court to determine the trust as per Para. 11 (V) of the Plaint and further that the 1.8 acres may be shared among the children of Njogu Kamau including the married sisters and/or divided among houses, a position that the Plaintiff submits that the 1st Defendant has not controverted and thus is bound by his pleadings. That the 1st Defendant has not filed any counter claim and therefore cannot be allowed to depart from his own pleadings and seek new prayers/raise new issues.

20. Further, the Plaintiff submitted that the 1st Defendant has been economical with the truth in his testimony: that he claimed in his statement that the two families live on the suit land each holding 1.8 acres while in evidence he states that it is he and the Plaintiff who live on the suit land.

21. The 1st Defendant submitted that according to the pleadings and evidence on record it is agreed that trust subsists on the suit land.

22. Relying on the cases of **Mukangu vs Mbui, Chogera vs. Kimani & 2 Others & Gituanja vs. Gituanja** 1st Defendant submitted that the Plaintiff was the eldest son of Kamau Njogu who died in 1952 and owned the fragments. During the land consolidation, the said fragments belonging to Kamau Njogu were consolidated into 2.7 acres and became registered in the name of the Plaintiff to hold in trust for the 2 houses of his father. The consolidation took place in 1963/64.

23. The 1st Defendant submitted that the 0.9 acre claimed from their uncle was part of the family land. The litigation was pursued by the Plaintiff and the 1st Defendant successfully and so the 0.9 is part and parcel of the family land. It never belonged to the Plaintiff. In any event, no pleadings were placed before the Court as regards the Court case alluded to no receipts of proof of any evidence of costs incurred was available.

24. As regards the alleged purchase of land by the Plaintiff, the 1st Defendant has submitted that the purchase from Kanyoru Githae on 1/2/1964 was unsupported by any evidence either documentary or oral. That the purported agreement for sale is not signed; nor does it disclose the land Reference and is wholly contrary to section 3(3) of the Law of Contract Act. That therefore, there was no contract and the 0.9 acres purported to have been acquired by the Plaintiff from the said Kanyoru Githae is part of the family land. The 1st Defendant queried why the Plaintiff did not register 0.9 acre portion in his name if indeed he had bought it. That there is no reason given by the Plaintiff why the said portion would be consolidated with his father's land.

25. The 1st Defendant reiterated that the Chief Magistrate's decree is still in force the same having not been overturned on appeal or challenged in a Judicial Review. That the Plaintiff is seeking to appeal by filing this particular suit and in his opinion it is an abuse of the process of the Court as it is seeking to sit an appeal on the orders of the High Court that declined to grant Judicial Review orders.

26. I have reviewed the pleadings, the evidence of the parties, the rival submissions and taking the totality of the evidence, the issues for determination are as analyzed in the Judgement.

27. Issues for determination;

A- Whether the Court can issue declaratory orders in this suit.

B- Costs.

28. As to whether the awards of Land Dispute Tribunal and Provincial Land Dispute Tribunal are null and void for lack of jurisdiction, the Plaintiff has persuaded the Court as such based on Section 3(1) of the Land Dispute Tribunal Act. That the tribunals had no jurisdiction to determine rights in land/ownership in land and therefore the awards are a nullity. The 1st Defendant on the other hand is emphatic that the judgement of the Chief Magistrate's Court arising from the awards in the Land Dispute Tribunal is still in force and the same is yet to be upset on appeal or challenged successfully by way of Judicial Review orders. The 1st Defendant has termed this suit as a disguised appeal which then would be tantamount to an abuse of the Court process. That in the circumstances the suit is resjudicata having been determined before by a competent Court.

29. The starting point is to examine the history of this matter; The **Maragua Land dispute No. 169 of 2005** was initiated by the 1st defendant seeking a share of the suit property LR LOC 4/MURUKA/400. The Tribunal decided to share the parcel of the suit property into two halves; the Plaintiff and the 1st defendant got 1.8 acres each to hold for themselves and in trust for the two houses of their father, their father having been married to two wives. Aggrieved by the decision of the District Land Dispute Tribunal at Maragua the Plaintiff/Respondent appealed to the **Provincial Land Appeals Tribunal No of 2009** where the award of the lower tribunal was affirmed and the Plaintiff's appeal was dismissed. Armed with the award, the 1st defendant moved the Chief Magistrate's Court on 18th October 2010 to adopt the decision of the Provincial Land Appeals Tribunal No of 2009 as follows;

i) land parcel LOC 4/MURUKA/400 be subdivided as follows; Ndung'u Kamau to get 1.8 acres share of his mother Tabitha

Wanjiru Kamau and Gitau Kamau to get 1.8 acres share of his mother.

ii) Gitau Kamau to remain with Ngatho land as before which is 2.0 acres to cater for his big family.

iii) The Government Surveyor jointly with the land Registrar to do the subdivision within a period of 90 days

iv) The executive officer to sign all the relevant documents to allow the subdivision and transfer of the same if any party fails to do so.

v) Both parties to share the costs of the surveyor

30. Aggrieved by the above decision the 1st Defendant filed a petition at the **High Court Petition No 4 of 2011 at Nyeri**. The Plaintiff/Respondent in this petition sought to attack the jurisdiction of both the Maragua Land Dispute Tribunal and the Provincial land dispute appeals committee on grounds of lack of jurisdiction to adjudicate the dispute over LR LOC 4/MURUKA/400. That the decisions of the two bodies breached his constitutional right to property. The learned Judge in his ruling dismissed the application as incompetent and misplaced because it was brought under constitutional provisions instead of either Judicial Review or appeal.

31. Section 3 (1) of the Land Disputes Tribunals Act Cap 303A (now repealed) limited the jurisdiction of land disputes Tribunals as follows;

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.

32. Much ink has gone into the all fundamental question of jurisdiction of a court and the consequences of an act taken in dearth of jurisdiction. In the case of **Sir Ali Bin Salim –vs- Shariff Mohamed Shatry Civil Appeal No. 29 of 1940 (East African Court of Appeal)** read together with that of **Jonathan Amunavi vs The Chairman Sabatia Division Lands Dispute Tribunal & Another, Kisumu Civil Appeal No. 256 of 2002(unreported)** and in addition to section 3(1) of the Land Tribunal Act**,** it is not in dispute that the decision rendered by the Kiharu Land Dispute Tribunal was arrived at without jurisdiction.

33. In the case of **MACFOY VS UNITED AFRICA CO LTD 1961 ALL ER 1169** Lord Denning distinguished between an act that is a mere irregularity and one that is a nullity. A mere irregularity is not void, but voidable. An act that is voidable is valid until it is made or declared void. It ceases to have effect after it is declared void; it is not void ab initio. What has been done or accomplished before, pursuant to that act, is not affected by the declaration. On the other hand, a nullity is really something that is void, a nothing right from the beginning. In the words of Lord Denning:

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse…But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside; and the court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it".

34. It is clear that the land dispute tribunals aforestated lacked the jurisdiction to determine matters of title to land. The Land Dispute tribunal Act (now repealed) provided avenues for redress that is to say under:-

"Section 8(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.

Section 9 -Either party to the appeal may appeal from the decision of the Appeals 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".

35. An aggrieved party had the option of filing a Judicial Review if the award had not been adopted by the Court or an appeal through the Provincial Appeals Board to the High Court. In this case, the Plaintiff did not file a judicial review or appealed the judgment of the magistrate's court aforestated as provided for under the said Act. Instead, he filed this declaratory suit.

36. Given the undisputed fact of law that a decision arrived without jurisdiction is a nullity, the question for determination is whether the plaintiff is entitled to declaratory orders in the plaint in view of a lower court judgement that remains unchallenged.

37. The answer to that question lies in the decision of the Court of Appeal in the case of **Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others Civil Appeal 184 of 2011** where the learned Judge stated 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."

38. Guided by the above rendition of the Court of Appeal which is binding on this Court, it follows that even if the court were to grant the declaratory orders, the same would have no effect in the face of the judgement of the lower court that remains undisturbed. The Plaintiff may by way of an appeal move the Court for appropriate orders in respect to the judgment of the Magistrate's court.

39. In view of these findings it is not necessary to continue considering the prayers or issues that may emanate from the parties.

40. **Final orders**: -

(a) This suit be and is hereby dismissed.

(b) Each party shall bear his own costs.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS DAY OF 29th MAY 2018.

J G KEMEI

JUDGE