REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.108 OF 2011

MIRIAM NJOKI GITONGA.....1ST APPELLANT

JOSEPH MAINA GACHUIRI.....2ND APPELLANT

VERSUS

MUSA WAMBUGU JOHN.....RESPONDENT

JUDGMENT ON APPEAL

(Being an appeal against the decision of Hon. T. Matheka, Senior Principal Magistrate in Nyahururu PMCC No. 173 of 1999 delivered on 2 June 2011)

(Respondent suing appellants in the subordinate court for certain land; respondent claiming that appellants acquired the land by fraud as he is the one who was entitled to it; judgment entered for respondent; appeal against the said judgment; dispute having been determined in an earlier suit which held that the respondent is not entitled to the said land; irrelevant that other parties in the suit were different; respondent having failed in that suit could not now sue new parties claiming the same land; suit by respondent was res judicata; wrong for trial magistrate to have proceeded to hear it and pass judgment in favour of the respondent; appeal allowed)

1. The appellants in this case were sued, alongside two other parties, namely Ngai Ndeithia Farmers Company Limited and the Land Registrar-Nyandarua, over the ownership of the land parcel Nyandarua/Kiriita/Mairo Inya Block II (Ngai Ndeithia)/3551 (hereinafter parcel No. 3551 or "the suit land"). It was the case of the respondent (as plaintiff) that this land was fraudulently caused to be registered in the name of the 1st appellant (sued as 1st defendant), who later sold and had it transferred to the 2nd appellant (sued as 4th defendant). It was his case that this property was initially held by the Ngai Ndeithia Farmers Company Limited (sued as 2nd defendant) a land buying company, and that he (the respondent) held two shares, for which he was issued with a share certificate on 3 October 1978, which entitled him to two parcels of land. He identified these parcels of land as the land parcels No. 418 and No. 419, each measuring 2 acres. It was his case that the land parcel No. 419 was fraudulently subdivided into two, and one acre transferred to the 1st appellant, and which then came to be parcel No. 3551, which is the suit land.

2. In his case, the respondent sought the following orders :-

> *(a) That the registration of the 1st defendant as proprietor of land parcel Nyandarua/Kiriita /Mairo Inya Block II (Ngaindethia)/3551 and subsequent transfer of the aforesaid land to the 4th*

defendant is illegal, null and void.

(b) That the 3rd defendant do completely destroy title deed No. Nyandarua/Kiriita/Mairo Inya Block II (Ngaindethia)/ 3551 now in the name of the 4th defendant and issue a new title deed to the plaintiff.

(c) An order that the 4th defendant do give vacant possession of the suit premises to the plaintiff.

(d) Mesne profits since 1996 to date of vacant possession.

(e) Costs and interest.

(f) Any other relief this Honourable Court may deem fit and just to grant.

3. At this juncture, I need to point out that the respondent is step son to the 1st appellant. The husband of the 1st appellant had two wives, the 1st appellant as second wife and Isabella Wanjiku Gitonga (mother to the respondent) as 1st wife.

4. The defence of the appellants was that the father of the respondent, one John Gitonga (who died in the year 1968 and was buried in Eldoret where it appears he used to live with his two wives), owned a share in Ngaindethia Farmers Company Limited. When he died, titles had not yet been issued and he had not fully paid for his share. The respondent then paid for the share and the said share was transferred to Isabella who later transferred it to the respondent who is her son. In addition, the respondent had independently purchased one share which entitled him to 2 acres of land, which is now the land parcel No. 418, and which is not in contention. A dispute arose as to the share allegedly owned by the deceased and at least two cases were filed. The first, Nyahururu Magistrate's Court Civil Suit No. 493 of 1993 was filed by the 1st appellant against the respondent. This case did not proceed to full hearing as it was withdrawn. The second suit was Nyahururu Magistrate's Court Civil Suit No. 116 of 1995. This case was referred by the Magistrate to the Land Disputes Tribunal for determination. The Land Disputes Tribunal, through a decision rendered on 18 November 1998, determined that John Gitonga (deceased) held a share entitling him to two acres of land. It held that the respondent could not hold this share and was only entitled to one acre. Essentially, the Tribunal was of the view that each wife of the late John Gitonga, was entitled to one acre each, of the land that was allegedly due to the deceased. It was therefore the defence of the appellants that the respondent could not now claim the suit land, which it was argued, is the one acre transferred to the 1st appellant as wife of John Gitonga.

5. After hearing the suit, the learned trial Magistrate was of the opinion that the respondent has proved his case on a balance of probabilities and entered judgment for the respondent as he had prayed in his plaint, save that she held that there was no proof on the claim for mesne profits which she dismissed.

6. The appellants are aggrieved by this judgment hence this appeal on the following grounds :-

(i) The Learned trial magistrate erred in law and fact in holding that the suit plot did not constitute part of the estate of Late John Gitonga notwithstanding the uncontroverted evidence of DW-3 to the contrary.

(ii) The Learned trial magistrate erred in law and fact in holding that the share certificate produced as exhibit 1 by the respondent referring to plots No. 113 and 125 constituted sufficient evidence that he owned the suit plot without any documentary evidence that either of the two changed to become plot No. 419.

(iii) The Learned trial magistrate erred in law and fact in holding that the Government was not a party to the subdivision and transfer of the suit plot whereas there was overwhelming documentary evidence to prove the same.

(iv) The Learned trial magistrate erred in law and fact in holding that DW-1 had no locus standi to

testify on behalf of the 1st appellant whereas there was no legal requirement for a power of attorney in order to do so.

(v) The Learned trial magistrate erred in law and fact in holding that since the application for consent to transfer the suit plot to the 2nd appellant was made on the same day when the 1st appellant was registered as proprietor thereof, the same could vitiate the 2nd appellant's title in law.

(vi) The Learned trial magistrate erred in law and fact in holding without any evidence that the 2nd appellant was privy to the process that was going on to dispose the suit property as quickly as possible thereby insinuating fraud against him.

(vii) The Learned trial magistrate erred in law and fact in holding that subdivision of Plot No. 419 into two portions and the subsequent registration of parcel No. 3551 was fraudulent without any evidence supporting the holding.

(viii) The Learned trial magistrate erred in law and fact in holding that the 1st appellant had no colour of right to obtain title to the suit plot and to sell the same to the 2nd appellant.

(ix) The Learned trial magistrate erred in law and fact in failing to consider the provisions of Sections 39 and 143 of the Registered Land Act before making the orders that she did against the 2nd appellant and arrived at a judgment that was against the weight of evidence.

(x) The Learned trial magistrate erred in law and fact in failing to find that the court had no jurisdiction under Section 159 of the Registered Land Act, to entertain the claim before it or make the orders sought in view of 2nd appellant's exhibit No. 8.

7. The appellants have sought for orders that the judgment be set aside with costs.

8. The respondent on his part has filed a cross-appeal against the dismissal of the claim for mesne profits.

9. This being a first appellate court, it is the duty of this court to re-evalute the evidence and assess it in order to make its own independent conclusions being alive to the fact that the court did not see nor hear the witnesses and giving due allowance for that. (See ***Selle & Another vs Associated Motor Boat Company Limited & Another (1968) EA 123 at 126***).

10. The respondent as plaintiff, testified and called one other witness. In his evidence, he stated inter alia that on 16 January 1969 he got a receipt of Kshs. 20 to register with Ngaindethia Farmers Company Ltd. He then paid Kshs. 400/= for the shamba and also Kshs. 1,110/= on 14 October 1969. He was then allotted a plot No. 113 which now became land parcel No. 419. He testified that in the year 1981, he paid for another share and he got some receipts No. 123 and No. 106. He testified that these receipts were taken by his brother and the records disappeared after he left them with his mother, Isabella. He was however issued with a share certificate for the two plots. He produced this share certificate as an exhibit. The same indicates that it was issued on 3 October 1978 and notes the Plot Nos. 113 and 125. He stated that the defendants obtained title to the parcel No. 419 fraudulently as it belonged to him. He testified that the 2nd appellant was aware of this, as a caution had been placed before he purchased the land from the 1st appellant. He also stated that he warned him and that he reported to the Chief who wrote to him a letter. When he purchased it, the 1st appellant was in possession.

11. He testified that there is another parcel of land registered as land parcel No. 3551 belonging to one John Mungai Kinyanjui. He could not tell how the 1st appellant got title since he had the share certificate. He stated that the 1st appellant has never been a shareholder of the company. He also stated that his father was never a shareholder of the company. He testified that no letters of administration have ever been issued regarding his estate. He stated that he has been farming on this land and getting between Kshs. 150,000 - Kshs. 160,000/= growing maize, potatoes and sweet potatoes. He claimed to be entitled to mesne profits of Kshs. 1,650,000/= from the year 1996 when the "2nd defendant took it." He also

produced a photocopy of a document said to be from the company which is hardly legible and whose value was not explained.

12. In cross-examination, he agreed that there had been two other cases filed, that is the case Nyahururu Magistrate's Court Civil Suits No. 493 of 1993 and No.116 of 1995 and that the latter case was referred to the Land Disputes Tribunal. He further conceded that at no time was the suit land ever registered in his name and that when the transfer to the 2nd appellant was effected, there was no restriction on the title of the 1st appellant. When he complained to the 2nd appellant, the land had already been registered in his (2nd appellant's) name.

13. PW-2 was Chege Muturi Tharamu, a surveyor with the Ministry of Lands, Nyandarua. His evidence was that there are two parcels of land registered as Nyandarua/Kiriita Mairo Inya / Block II (Ngaindethia)/ 3551. One is in the name of the 2nd appellant and the other in the name of one John Mungai Kinyanjui. They are contained in Sheets 2 and 6 of the Scheme and are located in different areas. The land of the 2nd appellant is noted to be one acre whereas the other parcel is about 1/8 of an acre. The title deeds and the sheets were produced as exhibits. There was also produced by consent the title deed to the land parcel Nyandarua/Kiriita Mairo Inya/ Block II (Ngaindethia)/419. This title is in the name of the respondent and the same shows that the land measures 0.8128 Ha (which is about 2 acres).

With that evidence, the plaintiff closed his case.

14. DW-1 was Josphat Bachia Gitonga. He is son to the 1st appellant. He stated that the 1st appellant was then about 90 years old and could neither read nor write. He testified that his father had one share and that he died before it was distributed. He stated that land was distributed in the year 1971. When his father was alive, they lived in Eldoret but moved to Nyandarua after his demise in 1969 and lived in the land under dispute. They discovered that the respondent had changed the land into his name and that is when the dispute started. He mentioned the dispute was heard at the Ngaindethia Company offices, the Chief, the District Officer and in Court. He identified the cases number 493 of 1993 which his mother filed and later withdrew and the case number 116 of 1995 filed by the respondent and which was referred by the court to the Land Disputes Tribunal. The Tribunal held that each of the wives of the late Gitonga ought to get an acre each. Her mother was issued with a title deed to the one acre which is now the land under dispute. They decided to sell the land to the 2nd appellant so that they would not be neighbours with the respondent. The land was therefore transferred to the 2nd appellant after the Land Control Board had issued consent. He denied that the title was acquired fraudulently. He stated that the 2nd appellant was not involved in their disputes and that he moved in and put up a permanent house. In cross-examination, he testified inter alia that the decision to subdivide the land into two had been made in 1993 by the District Officer and that they sold the land after getting the title deeds.

15. DW- 2 was the 2nd appellant. He testified that he purchased the suit land on 24 September 1996 and a sale agreement was made. He paid the money and consent to transfer was issued. He stated that the transfer was effected on 25 September 1996. He moved into the land and developed a house. He was not aware of disputes over the land when he purchased it. He produced a valuation report for the property prepared on 25 September 2002, as D-exhibit No. 8 showing that it has a value of Kshs. 1, 200,000/= inclusive of developments. In cross-examination he stated inter alia that he did not do a search prior to the purchase. He did not talk to the neighbours about it and no one was using the land. He denied receiving any letter from the Chief.

16. DW- 3 was Peter Maina Nganga. He is the Company Secretary of the Ngaindethia Farmers Company Limited having taken office in the year 2007. He testified inter alia that the dispute was first decided by a panel of elders on 22 June 1993. He produced their verdict as an exhibit and referred to the evidence tendered before the said panel. He also produced a transfer document where the Late Gitonga was transferring one acre to Isabella, said to have been effected on 24 June 1996. He testified that the company wrote letters to Isabella, the 1st appellant and the respondent to obtain titles to their respective parcels of land. In cross-examination, he stated that one share was equivalent to 2 acres on the ground. He also stated that he did not find any forgery in the register and that no case was brought to challenge the respondent's land. He stated that the parcel No. 419 was to be two acres. It came to be in the name of the

respondent after it was transferred to him.

17. With that evidence, the defendants closed their case save that there was absolutely no participation by the 3rd defendant, the Land Registrar, Nyandarua. Counsels filed their respective submissions and judgment was delivered on 2 June 2011.

18. I have already mentioned that the learned trial magistrate held for the respondent (as plaintiff) but made no award in respect of mesne profits which she dismissed. With regard to the 3rd defendant, she was not certain whether the 3rd defendant had ever been served with summons for there was no appearance entered on his part. In her judgment, the learned trial magistrate did acknowledge that there was evidence of previous suits and did acknowledge that the respondent's claim was dismissed within the suit Nyahururu Magistrate's Court Civil Suit No. 116 of 1995 after reference to the Land Disputes Tribunal. She did note that there was a record of an appeal against the decision of the Tribunal but observed that there was no indication of what happened to the said appeal. She doubted the transfer form of 24 June 1996, as at that time, John Gitonga had already died and the same was also not signed by the parties. She queried why the officials of the company would witness such a transfer document. She gave a lot of weight to the Share Certificate produced by the respondent and was of opinion that the same was not challenged. She questioned why John Gitonga was never issued with a share certificate if he was indeed a shareholder as alleged by the appellants. She was of no doubt that the land parcel No. 419 emanated from the plot No. 113 noted in the Share Certificate of the respondent. She stated that there was no evidence that the late John Gitonga had ever been allocated the Plot Nos. 113 or 419. She was of the opinion that the title of the land parcel No. 3551 in the name of the 1st appellant and later 4th appellant, sprang from nowhere and the process of subdivision of the parcel No. 419 appears not to have been followed properly. She pointed out to the other title bearing the same land parcel No. 3551 held by John Mungai Kinyanjui. She was of the view that it is this title of John Mungai Kinyanjui which properly holds the land parcel No. 3551. She held that DW-1 could not have locus standi to prosecute the case for the 1st defendant but could only testify as a witness. She did not agree with the argument of the appellants that the 1st appellant held a first registration and she pointed out that it was actually the Government which was the first registered proprietor. On whether the 2nd appellant purchased the land without notice, she held that there was no evidence that the 2nd appellant knew of the wrangles over the land. But she queried how consent to sell the land was applied for on the same date title was issued to the 1st appellant. She was of opinion that the 2nd appellant was not truthful as the sale agreement showed the sum of Kshs. 120,000/= yet the Green Card showed the transaction was of Kshs. 90,000/=. She was of the view that the 2nd appellant was privy to the on goings to dispose the property as quickly as possible. She finally held that it was clear that the subdivision of Plot No. 419 into two portions and subsequent transfer of one portion (the suit land, parcel No. 3551) was fraudulent. She held that the 1st appellant had no colour of right to obtain the title deed and sell it to the 2nd appellant. It is on the above reasoning that she held for the respondent and nullified the title of the 1st appellant and subsequent transfer to the 2nd appellant. She also awarded the respondent costs of the suit.

19. In his submissions, Mr. Gakuhi Chege, learned counsel for the appellants, submitted inter alia that the disputed property constituted part of the estate of the late John Gitonga. He further submitted that the Share Certificate of the respondent was doubtful since in his evidence, he testified that he purchased the second share on 8 August 1981, and he could not therefore hold a Share Certificate issued in 1978 covering two plots. He submitted that the burden of proof lay with the respondent and this was not discharged. He submitted that the respondent's exhibits No. 2 showed no plot numbers and that in any event they were ineligible. He submitted that the best evidence of ownership was that tendered before arbitral proceedings held in the year 1993. He submitted that it is the Government which issued the title to the 1st appellant and pointed out that the suit land was first registered in the name of the Government. He was of opinion that there was no illegality in the 1st appellant's title. He faulted the learned trial magistrate for holding that DW-1 could not testify for the 1st appellant and relied on the case of ***Stamm vs Tiwi Beach Hotel Limited (1995-1996) 2 EA 378***. He thought there was nothing irregular in applying for consent to transfer on the same date of issuance of the title and faulted the learned trial magistrate for being suspicious over this. He submitted that under Section 8 (4) of the Land Control Act, Cap 302, an application for consent can be made notwithstanding that the sale agreement is reduced into writing after the application is made. He submitted that Sections 28, 39 and 143 of the Registered Land Act (now

repealed) protected the 2nd appellant as purchaser. He relied on the case of ***Peter Maina Maingi vs Lucy Kagure Wanjohi, Nyeri Civil Appeal No. 95 of 2010 (2015) eKLR*** and ***Abiero vs Thabiti Finance Company Limited & Another (2001) KLR 496***. He submitted that the test for cancelling a title under Section 143 of the Registered Land Act had not been met. He finally raised the issue of jurisdiction and argued that the Magistrate's Court did not have jurisdiction. He was alive to the fact that the issue of jurisdiction had not been raised at the Magistrate's Court but relied on the case of ***Dubai Bank (K) Limited vs Kwanza Estates Limited (2015)eKLR*** as authority that a question of jurisdiction can be raised at any time. He submitted that Section 159 of the Registered Land Act, only gave jurisdiction to Magistrates to hear disputes not exceeding Kshs. 500,000/= yet the valuation report showed a value of Kshs. 1,200,000/=. He was of opinion that the Magistrate could therefore not hear the suit.

20. On his part, Mr. Nderitu Komu for the respondent, submitted inter alia that the Share Certificate of the respondent, showed that he was entitled to two parcels of land. He submitted that this Share Certificate was not disputed by DW-3 and thus the respondent was entitled to two parcels of land. He submitted that the land described as No. 113 in the Share Certificate was renumbered parcel No. 419 which was then subdivided into two portions thus the dispute. He submitted that there was no evidence tendered that the deceased was ever a shareholder of the 2nd defendant company. He was of the opinion that the arbitral proceedings which awarded the land to the 1st appellant were null and void as there was no legal representative in respect of the late John Gitonga. He relied on the case of ***Otieno vs Ougo KLR 407*** and ***Re Estate of Sheldon Oyalo Mukhale, Nakuru HCC Succession Cause No. 461 of 2009***. He submitted that the authority to subdivide the land came from the District Officer and he had no authority to do so. He was of opinion that the creation of the parcel No. 3551 was therefore fraudulent. He pointed at the other existing parcel No. 3551 owned by another party. He submitted that the process that led to registration of the 1st appellant as owner was crucial and relied on the case of ***Daudi Kiptugen vs Commissioner of Lands & 4 Others , Eldoret E& L Case No. 787 of 2011*** and ***Sisters of Notre Damme de Namur Registered Trustees vs The Attorney General & Another, Kisumu Petition No. 151 of 2012***. He was of the view that the process was illegal. He pointed out that the agreement of sale, came after the consent to transfer was applied for, which he thought was suspicious. He was of opinion that the discrepancy in the figures in the sale agreement and the title, raise suspicion. He agreed with the finding of the trial Magistrate that the motivation was to quickly dispose off the land. He submitted that if the 2nd appellant had carried out a search, he would have found two existing land parcels bearing the same parcel number and he relied on the case of ***Suleiman Rahemtulla Omar & Another vs Musa Hersi Fahive & 5 Others (2004) eKLR***. He submitted that the title of the 1st appellant having been obtained fraudulently, the subsequent transfer to the 2nd appellant cannot stand. He relied on the cases of ***Josphat Muthui Mwangi vs Chief Land Registrar & Others, Nakuru ELC No. 85 of 2012***, ***Suleiman Rahemtulla Omar (supra)*** , ***Sisters of Notre Damme (supra)*** and ***Alfred Kaplamai Bor vs Bonface Mutua Kisilu & 2 Others Eldoret ELC Case No. 1002 of 2012***. He did not agree with the submissions of the appellant that the Magistrate's Court had no jurisdiction over the matter as the sale agreement entered into in 1996 was for Kshs. 120,000/=. On the cross-appeal he was of the view that the respondent was entitled to mesne profits and damages as claimed. He relied on the case of ***Adrian Gilbert Muteshi vs William Samoei Ruto & 4 Others (2013) eKLR***.

21. Both counsels also made brief oral submissions to highlight which I have also taken note of after which I retired to write the judgment. Upon perusal of the matter, I thought parties had not addressed themselves fully on whether or not this suit is res judicata, and I invited additional submissions on the same. Counsels proceeded to file written submissions on this aspect of the case which I have taken note of.

22. I am aware that various grounds of appeal have been raised. I do not however intend to address all of them individually, as in my view, the matters in this appeal can be determined if I address myself to the following issues, being :-

(i) Whether the Magistrate had jurisdiction to hear and determine the matter.

(ii) Whether the suit was res judicata.

(iii) Whether the learned trial Magistrate erred in appreciating the evidence of DW-1.

(iv) Whether the respondent held shares entitling him to two parcels of land or whether the late John Gitonga held a share.

(v) Was the title of the 1st appellant acquired fraudulently

(vi) Can the title of the 2nd appellant be protected ?

(vii) Was the respondent entitled to mesne profits ?

23. I first propose to deal with two threshold points, jurisdiction and res judicata, for if I am to uphold any of these, then the appeal must succeed, and I need not go into the other substantive points raised.

Issue 1 : Whether the learned trial Magistrate had jurisdiction to hear the suit.

24. The issue of jurisdiction was not raised while the proceedings were going on in the Magistrate's Court. It is however noted as one of the grounds of appeal and is therefore being raised for the first time in the course of this appeal. Before I go too far, I think it is important that I state that it is vital that issues of jurisdiction be sorted out at the earliest opportunity. This saves parties time and money for there is really no need of labouring through the whole process of litigation when the forum has no jurisdiction in the first place. If a court has no jurisdiction, then it ought to down its tools immediately, for everything done without jurisdiction is a nullity. This was ably captured by Nyarangi J, in the case of ***Owners of Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Limited* (*1989) KLR 1*** where he made the now oft quoted dictum that *"Jurisdiction is everything. Without it, a Court has no power to make one more step"*.

25. In our case, the issue of jurisdiction is being raised on appeal. I am of course slightly irritated that the issue was not raised before the Magistrate's Court for a decision to be made, but that said, there is no bar to the question of jurisdiction being raised at any time, even on appeal. This was acknowledged by the Court of Appeal in its decision in the case Dubai ***Bank (K) Limited vs Kwanza Estates Limited (2015) eKLR*** cited by Mr. Chege for the appellants. In that case, the court cited with approval the case of ***Floriculture International Ltd vs Central Kenya Ltd & 3 Others (1995) eKLR*** where the Court of Appeal stated as follows on the issue :-

> *"It has been held in the case of* **Kenindia Assurance Co. Ltd vs Otiende (1989) 2 KAR 162***, that the normal rule that a party could not raise for the first time on appeal a point he had failed to raise in the High Court, did not, and could not apply when the issue sought to be raised de novo on appeal went to jurisdiction."*

In the case of ***Dubai Bank (K) Limited vs Kwanza Estates Ltd***, the court went on to justify this position in the following dictum (at page 9 of the decision) :-

> *"The reasoning is that even where the question of jurisdiction is not raised that does not necessary (sic) confer jurisdiction on the court if it has none. Accordingly, we find that the appellants are not precluded from raising the jurisdictional issue for the first time on appeal having not raised it in the superior court."*

26. I am in agreement with the above position and I will therefore straight away embark on determining whether or not the court had jurisdiction.

27. The argument raised by the appellants is that the subject matter of the suit went beyond the prescribed pecuniary jurisdiction of the court. This suit was filed in the Magistrate's Court at Nyahururu. The land in issue was registered under the Registered Land Act, (formerly Cap 300, Laws of Kenya but repealed in 2012 by the Land Registration Act, Act No. 3 of 2012) and it is this statute that applied in determining which forum could hear the case. Section 159 of the Registered Land Act provided as follows :-

159. *Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court, or, where the dispute comes within the provisions of section 3 (1) of the Land Disputes Tribunals Act in accordance with that Act.*

28. It will be seen from the above that jurisdiction to hear disputes for land registered under the Registered Land Act, was to be with the High Court, but where the value of the subject matter did not exceed twenty five thousand pounds (the equivalent of Kshs. 500,000/=) the dispute could be heard before the Magistrate's Court.

29. In his submissions, Mr. Chege referred me to the valuation report, that was tendered by the 2nd appellant as an exhibit, to demonstrate that the value of the suit land went beyond Kshs. 500,000/= . I have gone through the report. I note that it was prepared on 25 September 2002. The full value of the suit land is given as Kshs. 1, 200,000/=. The justification for this value was broken down as follows :-

(i) Land - Kshs. 280,000/=

(ii) Farm houses plus related improvements - Kshs. 900,000/=

(iii) Water developments - Kshs. 20,000/=.

30. In reply, Mr. Nderitu for the respondent argued that the court had jurisdiction because the issue at hand was the ownership of the land and not the improvements that were carried out. He submitted that the respondent in his suit did not lay any claim over the developments. His view therefore was that the dispute was only over the land value which was noted to be Kshs. 280,000/=.

31. I do not agree with Mr. Nderitu's hypothesis. This is because it goes against the very definition of land as stated in Section 3 of the Registered Land Act,(now repealed but which was statute), the operative statute, which provides as follows :-

"land" includes land covered with water, all things growing on land and buildings and other things permanently affixed to land".

32. When the dispute is over land, one cannot purport to separate the values of the site and of the developments. All collectively comprise the land under dispute.

33. However, to me, I do not think it can be determined with clarity from the evidence tabled, on when exactly the value of the land came to be Kshs. 1,200,000/=. In the year 1996 when the land was sold to the 2nd appellant, the value noted in the agreement was Kshs. 120,000/= (although the Green Card shows that consideration for the transfer was Kshs. 90,000/=). This case was filed in the year 1999. The valuation report does not state when the property was developed so that the value would now jump to Kshs. 1,200,000/=. Nowhere in the proceedings have I seen an unambiguous statement of when the developments were completed. I have only seen that when the 2nd appellant was being cross-examined, he stated that he commenced developments in the year 1998. It is probable that in the year 1999, when this suit was filed, the developments noted by the valuer may not have been there. Without the developments, the value of the land would be quite less than the noted value. Where jurisdiction is pegged on pecuniary value, the applicable value is the value at the time the suit is filed. The value may fluctuate over time, but what is determinate is the value at the time of filing suit, not the valuation at a latter time.

34. For the appellants to succeed in their argument that the court had no jurisdiction, they needed to demonstrate, that the value of the land at the time the suit was filed was Kshs. 500,000/=, unless it was quite obvious and no other conclusion could be made, that the value could not have been by any stretch of imagination, be any less than Kshs. 500,000/=. The appellants only showed the value as at the year 2002,

when developments had been made, and no indication of the value at the time the suit was filed. Neither can I say that it is apparent, and beyond argument, that the value of the subject matter was more than Kshs. 500,000/= when the suit was filed. I am therefore not of the view that the appellants have demonstrated that the Magistrate's Court had no jurisdiction when the suit was filed in the year 1999. The argument that the Court had no jurisdiction therefore fails.

Issue 2 : Was the suit res judicata ?

35. Before I address myself on this issue, I need to point out that the original file appears to have been destroyed by a fire which engulfed the Nyahururu Court. The file was then reconstructed, and on 7 August 2003, an order was made that the file is properly reconstructed. It does appear that at some point, a preliminary objection was raised that the suit is res judicata. There is a ruling on record on this preliminary objection which was determined by Hon. D.K. Ngomo on a date that is not very clear to me. The argument in the preliminary objection was that there had been filed earlier the suit No. 116 of 1995 by the respondent and hence bringing the same matter back was either res judicata or an abuse of the process of court. In dismissing the preliminary objection, the court stated that there was no demonstration of a connection between the defendant in the earlier suit and in the present suit. It was also stated that all the defendants in this suit are completely different from the ones in the suit No. 116 of 195.

36. The issue of res judicata is not in the memorandum of appeal but it is something that we cannot escape from. As I mentioned earlier, upon noting that it is an important issue in this suit, I asked counsels to address themselves on this point.

37. My own view is that this suit is res judicata. The principle of res judicata is contained in Section 6 and 7 of the Civil Procedure Act, Cap 21, which provide as follows :-

> ***6. Stay of suit***
>
> *No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.*
>
> *Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.*
>
> ***7. Res judicata***
>
> *No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.*

38. The doctrine of res judicata has its roots in the common law and is aimed at preventing the relitigation of matters that have already been determined. The record before me shows that there were two previous suits, namely the cases Nyahururu Magistrate's Civil Suit No. 493 of 1993 and Civil Suit No. 116 of 1995. In civil suit No. 493 of 1993, the plaintiff was the 1st appellant and the defendant was the respondent. The 1st appellant's claim was for a half share of Plot No. 164 in Ngai Ndethia. Her case was that her late husband held a share in Ngai Ndethia but died before balloting for it. It was pleaded that his other wife, Isabella, balloted for the two acre plot on the understanding that she would hold it in trust for the 1st appellant as well, but instead, she transferred it to the respondent. In the suit, the 1st appellant asked for subdivision of the plot and one half to be registered in her name. This case did not proceed for hearing as it was withdrawn on 15 December 1994.

39. The second suit, case No. 116 of 1995 was instituted by the respondent against Josphat Bachia Gitonga, John Kariuki Gitonga, Kiboi Kaguthi and Ngai Ndethia Public Company Ltd. The claim inter alia was for trespass against the first three defendants and for an order that the company be directed to issue the respondent with the requisite documents to get the title deed. The first three defendants are sons of the 1st appellant herein and it was claimed that they had illegally gained entry into land belonging to the respondent. It will be recalled that this case was referred by the trial Magistrate to the Land Disputes Tribunal. After hearing the matter, the Tribunal's findings were that the father of the respondent was a shareholder in the company; that the same share was transferred to Isabella Wanjiku who in turn transferred the plot to the respondent; that the respondent may only inherit one acre of the land i.e that portion belonging to his mother. The Tribunal dismissed the case on trespass and ordered that the respondent be restrained from interfering with the land parcel Nyandarua/Kiriita Mairo Inya Block II/ 3551. It will be observed that it is the same parcel of land in the dispute herein. The respondent preferred an appeal against this decision but the same seems to have been struck out. I am not sure of what action was taken to execute the decision of the Tribunal but there is no question that the said decision has never been set aside.

40. In my view, it was improper for the respondent to yet again claim the same land, albeit now against the 1st appellant, when he had already lost his claim for the land, when he sued the sons of the 1st appellant for trespass. It was already held in the previous suit that the respondent had no right over the one acre of the land identified as Plot No. 3551 which is the same land in issue in this case. The respondent could not now seek to reverse that decision by suing a different party. It mattered not that the persons sued are different. He had already lost his claim over the land and he could not now seek to appeal that decision by filing a new suit against a different person. His avenue was to appeal against that judgment, or in other acceptable legal channels, seek to quash it. He never did any of this. The fact that he sued different parties never changed the substance of the case, which was, who is entitled to ownership of the land parcel No. 3551.

41. My holding is that the suit herein filed by the respondent was res judicata. His claim over the land had already been determined in the case Nyahururu PMCC No. 116 of 1995 and it had already been held that he is not entitled to the said land. My decision herein means that the entire proceedings in Nyahururu PMCC No. 173 of 1999 were a nullity. The court ought never to have heard the case, or upon hearing, ought to have dismissed it for being res judicata. It was wrong for the learned trial magistrate to now give judgment for the respondent and award him the same land that he had lost in a previous suit. On that fault of the magistrate, this appeal must succeed and the parties must be taken back to the situation that they were after the judgment in the case No. 116 of 1995. The decision in that suit is that the respondent was not entitled to the land parcel No. 3551.

42. Given the said decision, there was nothing that would bar the 1st appellant from disposing of the land to the 2nd appellant. That sale to the 2nd appellant cannot be held to have been fraudulent by any stretch of imagination. The sale may have been done hastily, but there is nothing wrong or fraudulent with a property holder attempting to quickly sell what he/she owns. If a person decides to sell his property on the same day that he has got his title deed, where is the fraud in that ? He or she can deal with the property as he/she wishes. The sale was passed by the Land Control Board and the 2nd appellant got title to the land. To me, he was an innocent buyer for value. He was not only innocent, but he also purchased the property from a person who the law considered to have proper title to the land.

43. I feel that it is unnecessary for me to dig back into the history of the land and how the 1st appellant got title. I say so because that issue was decided in the suit No. 116 of 1995. I am not sitting on appeal against that decision. Without there being an appeal against that decision, I have no jurisdiction to reverse it, or to make findings on it. Unless and until that decision is reversed, the same stands and through it, it was held that the respondent has no right over the suit land. Given this position, it would be wrong for me to dwell into the history of the land, or whether the 1st appellant properly acquired it, or dwell into whether the respondent actually held two shares entitling him to 2 plots of 2 acres each. In essence I need not determine all those matters in this appeal. They have already been determined before.

44. For the reasons above, this appeal succeeds, but before I close, I need to make a couple of directions

concerning the titles held by the parties herein.

45. First, I have noted that there are two land parcels bearing the registration Nyandarua/Kiriita Mairo Inya/ Block II (Ngaindethia)/3551. For good land administration, there ought only be one land parcel registered under this title. I hereby direct the District Land Registrar, Nyandarua, to proceed to renumber either the title held by the 2nd appellant, or the other title held by John Mungai Kinyanjui or whoever his successor may be, so that there will only be one land parcel bearing the title Nyandarua/Kiriita Mairo Inya/Block II (Ngaindethia)/3551.

46. Secondly, I have observed that the respondent was issued with a title bearing the parcel number Nyandarua/Kiriita Mairo Inya Block II (Ngaindethia)/419 measuring 2 acres. The respondent ought not to have obtained a title bearing two acres but a title bearing one acre. There is no land to cover two acres which will not include the one acre of the 2nd appellant. It is therefore necessary that the title of the respondent be rectified to read one acre. Similarly, I do direct the Land Registrar, Nyandarua, to proceed and correct the title held by the respondent to the parcel No. 419 so that the same reflects one acre or thereabouts and not two acres as noted in the title deed.

47. I have not forgotten that there were other issues raised in this appeal, but given my holding that the whole case was res judicata, I have not found it necessary to delve into them.

48. The only issue left is costs. The respondent ought not to have filed the suit from which this appeal has emanated, given that he had already lost his claim over the land. The appellants will therefore have the costs of this appeal and of the suit Nyahururu PMCC No. 173 of 1999 alongside the company sued as 2nd defendant in the said case.

49. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 25th day of May 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of:

2nd appellant: present

Other parties :absent

No appearance on part of M/s Gakuhi Chege & Company advocates for the appellants

No appearance on the part of M/s Nderitu Komu & Co. Advocates for the respondent

Court Assistant : Nelima

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU