



Achilla (Represented by Erick Obina & Akunaya Janet) v Aradi (Represented by John Agulinda & Mudii Fanuel Aradi) (Environment & Land Case 47 of 2019) [2024] KEELC 3473 (KLR) (29 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3473 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 47 OF 2019
FO NYAGAKA, J
APRIL 29, 2024**

BETWEEN

THE ESTATE OF DISHON BOCKY ACHILLA (REPRESENTED BY ERICK OBINA & AKUNAYA JANET) PLAINTIFF

AND

THE ESTATE OF IMBUGWA ARADI (REPRESENTED BY JOHN AGULINDA & MUDII FANUEL ARADI) DEFENDANT

JUDGMENT

The plaintiffs case

1. By a Plaint dated 18/06/2019, amended on 21/12/2021 and further amended on 17/11/2022, the Plaintiffs prayed for the following reliefs: -
 - a. A declaration that the original plaintiff herein was not a party to the proceedings in Kibomet Land Dispute Tribunal and whose award was adopted as the judgment of the Court by Kitale PMC Land Case No. 72 of 1995;
 - b. A declaration that the decision of the Kibomet Land Disputes Tribunal against a deceased person who had died on 16th June, 1991, long before the Tribunal proceedings commenced, and without a grant over his estate having been applied for and obtained, was irregular and contrary to the law;
 - c. A declaration that Mr. Achilla referred to in the award of the Kibomet Land Disputes Tribunal and which was adopted as the judgment of the court vide Kitale PMC Land Case No. 72 of 1995 was Robert Edward Archilla Amtabi and not Dishon Rocky Achilla, the original plaintiff in this suit;



- d. A declaration that the decree extracted and signed by the Court in Kitale Principal Magistrates Court Land Case No. 72 of 1995 was at variance with the decision of the Land Disputes Tribunal;
- e. A declaration that the execution of the decree in Kitale PMC Land Case 72 of 1995 by way of subdividing the original plaintiff's land comprised in title numbers Kitale Municipality Block 17/Bidii/31 and 34 and transferring parcel Nos. 221 and 223 both with an acreage of 75 to Imbuguah Kiziiri Aradi was fraudulent and illegal;
- f. An order that the defendant herein do transfer the lands comprised in title numbers Kitale Municipality Block 17/Bidii/227, 228, 230 and 231 to the estate of the original plaintiff and in default the Deputy Registrar of this Court to execute all documents that would facilitate the transfers. Further, that the estate of the late Imbuguah Kiziiri Aradi be ordered to move out of the parcels of land, failing which the estate and anybody claiming thereunder forcefully evicted;
- g. ...spent
- h. Costs.
- i. Interest.

SUBPARA j.

Any other relief that this Honourable Court may deem fit to grant.

2. It was the Plaintiffs' claim that they are representatives of the estate of the late Dishon Rocky Achillah. They have sued the defendant who is described as the estate of the late Imbuguah Kiziiri Aradi. They claimed further that vide an order dated 13/11/2018 in Kitale High Court Succession Cause No. 32 of 2017, one John Aguilinda Aradi, the citee, was ordered to apply for a grant over the estate of the late Imbuguah Aradi within 30 days failing which the citee Esther Amimo Achillah would apply for the grant.
3. They claimed that through an ad-litem grant issued to them, Eric Obina Achillah and Akunava Janet, on 26/08/2021, in Kitale CMC Ad-Litem Cause No. 59 of 2021, the two were appointed as Administrators over the estate of the late Dishon Rocky Achillah who died on 09/04/2021.
4. They averred further that John Aradi never applied for a grant as ordered. For that reason, the citee, vide Kitale Chief Magistrate's Court Succession Cause No. 77 of 2018, applied for a grant and obtained the same, limited only to defending this suit against the estate of the late Imbuguah Aradi.
5. Further that the father of the original plaintiff, namely, Robert Amtabi Achillah, died on 16/06/1991. Before his death, the deceased owned some parcel of land, being part of LR. No. 8815, commonly known as Bidii Farm. No grant of letters of administration to date had ever been applied for over the estate of the said Robert Amtabi Achilla. That in 1994, and unknown to the original plaintiff herein, who at the time was living and working in Eldoret, the late Imbusi Kiziiri Aradi commenced proceedings in the Kibomet Land Disputes Tribunal against Amtabi Achillah who had died on 16/06/1991. The claim for that land was filed against Phoebe K. Amtabi, the wife of Amtabi Achillah, notwithstanding the fact that she was not the administrator of the estate.
6. The original plaintiff herein was not named in the statement of claim by the late Imbuguah Aradi. Indeed, throughout the proceedings in the Land Dispute Tribunal, the original plaintiff was never mentioned or referred to at all. The decision on the Tribunal awarded the late Kiziiri Aradi 75 acres from Mr. Achillah's share in Bidii Farm although the Claimant's claim was for 30 acres only.



7. When the Kibomet Land Disputes Tribunal forwarded the proceedings to the Kitale Principal Magistrate's Court for adoption, the name of the original Plaintiff was introduced in the heading of the proceedings, but without indication whether he was a party or not. When the Kitale Principal Magistrates Court, through letters dated 18/05/1995 and 22/06/1995, invited parties for the reading and adoption of the award the original Plaintiff, who was not a party, was not invited.
8. When the late Imbuguah Aradi wrote a letter on 17/09/1995 requesting that the decree be drawn he still referred to the parties in the suit as himself and Phoebe K. Amtabi Achillah. When the court drew the decree in the Principal Magistrates Court, for the first time, the defendants were shown as two, that is, Phoebe K. Amtabi and Dr. Achilla. The Claim of the original Plaintiff in the decree was shown as 30 acres in Sabwani Group in Bidii Farm but the order in the decree was that the original plaintiff Imbuguah Kiziiri Aradi was awarded 75 acres and which share was to be taken from the defendant's share in Bidi Farm LR No. 8815. The Tribunal's decision was clear that 75 acres were to be recovered from Robert Amitabh Achillah's share and the Achillah referred to in the Tribunal award was the one who had died on 16/06/1991.
9. The original plaintiff herein on 22/08/1995 become the registered proprietor of parcel numbers Kitale Municipality Block 17/Bidii/31 and 34 (herein referred to as parcel No. 31 and 34 respectively), which measured 5.06 hectares and 54.90 hectares respectively. Those parcels were never the subject of the Tribunal award or the decree emanating from it.
10. Unknown to the original plaintiff, Phoebe K. Amtabi Achillah filed a suit in Eldoret High Court Case No. 101 of 1996; Phoebe K. Amtabi Achila and Dr. Achila vs. Imbuguah Kiziiri Aradi and Tom Nyakichanga seeking a declaration that the decision of the Disputes Tribunal award adopted as a judgment of the Court in Kitale PM's Court Land Case No. 72 of 1995 was a nullity. The matter was later transferred to Kitale High Court and became High Court Case No. 107 of 1997, which was dismissed for want of prosecution on 06/10/2004. But the original plaintiff herein was never aware of the two suits and indeed never served to attend court at any time.
11. In 1999, when the original plaintiff was still registered as the owner of the parcels of land No. 31 and 34, he filed suit against Imbuguah Kiziiri Aradi namely Kitale HCCC No. 117 of 1999; Dr. Achillah vs. Imbuguah Kiziiri Aradi, who had started interfering with the original plaintiff's user of his own land. The suit was withdrawn on the 06/12/2004 following the death of the defendant on 14/12/2002. Nobody took out letters of administration over his estate.
12. Unknown to the original plaintiff, orders were issued in Kitale PMC Land Case No. 72 of 1995 that the defendants to execute the transfer in favour of Imbuguah Kiziiri Aradi and in default the Executive Officer of the court to execute the same.
13. Although the original plaintiff was not a party to Kitale PMC Land Case No. 72 of 1995, nor were his land parcel numbers 31 and 34 the subject in that suit, the court, again and without the knowledge of the original plaintiff, signed a mutation form for the subdivision of the two parcels of land. As a result, parcel No. 34 was subdivided into parcel numbers 222 and 223, the latter measuring 26.30 hectares (64.96 acres). Its title was issued in the name of Imbuguah Kiziiri Aradi. Parcel No. 31 was divided into parcel numbers 220 and 221, the latter measuring 4.0526 hectares (10 acres) also registered in the name of Imbuguah Kiziiri Aradi.
14. It was the original plaintiff's contention that the intention of the late Imbuguah Aradi in consolidating parcel numbers 223 and 221 into his own parcel of land and the subdivision of parcel number 224 into 6 plots was to complicate the tracing of the original plaintiff's land and the exercise was fraudulent. He particularized the fraud as follows:



1. Executing the tribunal award against the original plaintiff, who was not a party to the dispute before the tribunal;
 2. Enforcing a decree that was at variance with that of the tribunal award;
 3. Failing to point out to the court that the original plaintiff herein was not a party to the tribunal dispute;
 4. Causing the original plaintiff's land parcel number Kitale Municipality Block 7/Bidii/ 31 and 34 to be subdivided and transferring 75 acres of it to himself, while knowing well that the original plaintiff was not a party and further that Kitale Municipality Block 17/Bidii /31 and 34 were not mentioned in the decree;
 5. Obtaining an order that the Executive Officer of the Kitale subordinate court executes all documents to facilitate the transfer of 75 acres, part of the original plaintiff's land, to himself while knowing well that the original plaintiff was not a party to the suit, and that his land was not the subject of Kitale Principal Magistrate's Court land case 72 of 1995.
15. He pleaded that by reason of the fraudulent takeover of 75 acres of part of his land comprised in parcel Nos. 31 and 34, the original plaintiff was illegally deprived of his land and user thereof and had suffered damage.
16. It was his further claim that whereas some of the parcels referred to above had been disposed of and subdivided into other parcels and transferred to other people Imbuguah Aradi, the following parcels were still registered in his name.
1. Kitale Municipality Block 17/ Bidii/227 measuring 8.094 hectares.
 2. Kitale Municipality Block 17/Bidii/230 measuring 6.25 hectares.
 3. Kitale Municipality Block 17/Bidii/231 measuring 5.31 hectares.
 4. Kitale Municipality Block 17/Bidii/228 measuring 1.318 hectares.
17. He claimed further that in November, 2007, he noticed strangers entering into what he believed was his land but insisted that the land belonged to the late Imbuguah Aradi. Upon inquiring from the Lands Office, it transpired to him that part of his land had been subdivided and 75 acres given to the late Imuguah Aradi pursuant to a court order in Kitale PMC Land Case No. 72 of 1995. However, accessing the file in order to appreciate what happened was only realized in 2017.
18. He claimed further that his 75 acres, part of parcel Nos. 31 and 34 were fraudulently transferred to the late Imbuguah Kiziiri Aradi and the four parcels pleaded above, measuring approximately 20.972 hectares (51.972 acres) should be restored back to the original Plaintiff. He pleaded that demand had been issued and there was no suit pending or determined previously between the parties. In the end, the estate prayed that the suit be allowed as sought.

The Defence

19. The Defendants filed a Statement of Defence dated 29/05/2022 on 21/09/2019. They contended that the suit was misconceived, bad in law and caught up by limitation of action, a gross abuse of the process of the court and ought to be struck out.



20. They claimed that the estate of the late Imbuguah Kiziiri Aradi had obtained a full grant of Letters of Administration Intestate issued to John Agulinda Aradi and Mudii Fanuel Aradi. Further, on 27/07/1994, the late Imbuguah Aradi filed a land dispute pursuant to the provisions of the Land Disputes Tribunal Act 1990 against Mrs. Phoebe Amutabi Achillah and Dishon Rocky Achilla. That the plaintiff herein, Dishon Rocky Achillah was then working in Eldoret as a consultant Valuer. His postal address number 4009 Eldoret was used for correspondence during the proceedings at the Land Dispute Tribunal. The late Dishon Rocky Achilla was the son of the late Robert Amutabi Achilla who died on 16/06/1991 and was always aware of the dispute before the Land Dispute Tribunal, as discerned from his letter dated 25/01/1995 to the late Imbuguah Kiziiri Aradi whose estate is the defendant herein.
21. They averred that the claim by Imbuguah Aradi in the dispute was that he paid half of the share of the late Robert Amutabi Achilla in Bidii Land Limited and proceeded to use the same for a period of 18 years effective 02/08/1994. According to Imbuguah Aradi, he had no dispute with the late Robert Amutabi Achillah as they agreed to split the share of Robert Amutabi Achilla into half. However, Mrs. Phoebe Achilla and her son Dishon Rocky Achilla protested to the same. That the Land Disputes Tribunal decided in favour of the late Imbuguah Kiziiri Aradi on 18/07/1995. Thereafter in Kitale PM Court Land Case No. 72 of 1995, the decision was adopted as the judgment of the court.
22. Post facto the judgment on 22/08/1995, the late Dishon Rocky Achilla rushed to the Lands Office to fraudulently and maliciously obtain registration of the suit land known as Kitale Municipality Block 17/Bidii/31 and 34 which land parcel constituted the subject matter in the Land Case No. 72 of 1995. The decree of the Honourable Court in the Land Case No. 72 of 1995 was executed against the titles namely Kitale Municipality Block 17/Bidii/31 and 34 thereby subdividing them into parcels of land namely Kitale Municipality Block 17/Bidii/220, 221, 222 and 223. That land parcel No. 220 was registered in the name of Dishon Rocky Achilla on 27/04/2000 and parcel No. 221 was registered in the name of Imbuguah Kiziiri Aradi. That parcel No. 221 was on 5/05/2000 fused with land parcel numbers Kitale Municipality Block 17/Bidii/21, 22, 30, 219 and 223 to form parcel No. 224 which was thereafter closed on subdivision into land parcel numbers 225, 226, 227, 228, 230 and 231. That on 18/05/2016, parcel No. 226 was closed on subdivision into land parcel namely Kitale Municipality Block 17/Bidii/769, 770, 773 - 793 and 820 - 828.
23. That parcel No. 229 was registered in the name of John Agulinda Aradi on 30/06/2005 and transferred to one Malesi Been Mugodo. The transferee subsequently subdivided the plot it into parcel numbers Kitale Municipality Block 17/Bidii/538 - 567 on 25/11/2013. They pleaded further that to date, no appeal or review had ever been preferred against the judgment of Land Case No. 72 of 1995 within the stipulated time wherein a decree was issued to the late Imbuguah Kiziiri Aradi.
24. It was their claim that in the year 1996, Phoebe K. Amutabi filed Eldoret HCCC No. 11 of 1996; Phoebe K. Amutabi Achilla and Dishon Rocky Achilla vs. Imbuguah Kiziiri Aradi and Tom Nyakichanga seeking a declaration that the Land Disputes Tribunal Case, whose decision was adopted in the Kitale Principal Magistrate's Court, was a nullity. The case was transferred to Kitale HCCC No. 107 of 1997. It was dismissed on 06/10/2004, two years after the death of the late Imbuguah Kiziiri Aradi. Since then, no efforts had been made to revive the suit.
25. The defendants denied in toto the allegations of fraud. Further, the defendants pleaded that they were strangers to the allegations that they were strangers on the land in 2007. They maintained that the land belonged to the late Imbuguah Aradi. They denied that the plaintiffs were entitled to the 75 acres which, according to them, was part of parcel Nos. 31 and 34 fraudulently transferred to the late Imuguah K. Aradi. They denied that the plaintiffs were entitled to the four parcels of land as pleaded.



They pleaded that the suit was res judicata and in addition, that the cause of action was caught by limitation of time.

26. The Plaintiffs filed a Reply to Defence dated 23/01/2023. They reiterated the averments in the plaint, particularly, paragraphs 5, 6, 8, 10 and 11. They denied that the original Plaintiff was always aware of the dispute in the Land Dispute's Tribunal and further that the post office box number 4009 belonged to him. Further, they stated that neither Mrs. Phoebe K. Amutabi Achilla nor the original plaintiff were administrators of the estate of the late Robert A. Achillah who died on 16/06/1991. They also denied that after the judgment of the subordinate court dated 22/08/1995, the said Dishon Rocky Achilla fraudulently and maliciously obtained registration of parcel Nos. 31 and 34 into his name. They reiterated the other contents of the Plaint particularly paragraphs 12, 16, 17, 18 and denied that the suit was res judicata and time barred by dint of the Limitation of Actions Act CAP 22 Laws of Kenya and that it was an abuse of the process of the court.

Plaintiffs' Evidence

27. The plaintiff called the Court Administrator in charge of the Civil Registry, Kitale, one Leticiah Asolo, who testified as PW1. She produced as P.Exhibit 1 the original Court file for Kitale PMCC. No. 72 of 1995. On cross-examination, she said there was no evidence of an appeal filed against the court's decision. Further, the matter was finalized on 26/01/2000 and finally, that the award was adopted as the judgment of the court on the 18/07/1995.
28. The 1st Plaintiff testified as PW2. He adopted his late father's statement written on 18/06/2019. He added that the 2nd plaintiff was his mother and that Dishon Rocky Achilla was his late father. He also said that he and his mother had obtained Limited Grant of Letters of Administration dated 26/08/2021 in respect to the estate of his late father who died on 09/04/2021. That they had been substituted as Plaintiffs. He relied on his witness stated dated 18/06/2019 as his evidence-in-chief.
29. His further evidence was that his paternal grandfather, one Robert Edward Amutabi Achilla died on 16/06/1991 while his paternal grandmother was called Phoebe K. Achilla. He testified further that he had heard of Imbuguah Kiziiri Aradi, now deceased, but had never met him. That after his death, the defendants took out letters of administration on behalf of his estate. He produced as P.Exhibit 3 the Death Certificate of his late grandfather. His evidence was that by 1994, no one had taken out letters of administration to the estate of late grandfather. He testified further that Imbuguah K. Aradi wrote a letter to the Chairman of the Kibomet Land Disputes Tribunal. By the said letter, Mr. Aradi raised a claim between himself and Edward Amutabi Achilla yet by that time, Robert Amutabi Achilla had died in 1991.
30. He stated that when the letter was written, and even thereafter, no administrator to his late grandfather's estate had been appointed and Mr. Aradi did not mention that in the letter. He produced the letter as P.Exhibit 4. That the dispute proceeded before the Tribunal and on 19/07/1994, it made a decision in favour of Mr. Aradi. That in the Tribunal, the plaintiff was Mr. Aradi and the Defendant Mrs. Phoebe Amutabi Achilla. Further, the proceedings recorded D. R. Achilla but they did not indicate that he was a defendant.
31. His evidence was that the name D. R. Achilla represented his late father. But that time, the late Aradi did not mention in his evidence the 1st plaintiff's late father at all. When the Tribunal ruled on the dispute, the judgment was made against Mr. Achilla's share, and his name was indicated as Robert Edward Archila Amutabi who had long died. He produced and was marked P.Exhibit 5, the proceedings and ruling of the Tribunal.



32. He testified that on 18/05/1995, the Court wrote a letter to Imbuguah K. Aradi and Phoebe K. Amutabi in reference to Kitale PM's Land Case No. 72 of 1995 that the award would be adopted on 13/06/1995. Noticeably, the letter, marked P.Exhibit 6, was not addressed to his father, D. Rocky Achilla. Further, on 22/06/1995, the court again wrote to the two people. His father was not addressed. The letter, marked P.Exhibit 7, stated that the adoption was to take place on 18/07/1995.
33. His further evidence was that Imuguah Aradi wrote a letter dated 19/09/1995 [P.Exhibit 8] addressed to the Principal Magistrate Kitale, in reference to Land Case No. 72 of 1995. He named himself and Phoebe K. Amutabi as parties. His father D.R. Achilla was not included. The letter requested for a decree that was later drawn.
34. PW2 testified that from nowhere, the decree introduced Dr. R. Achillah yet the Tribunal did not make an award against him. That the award was against Edward Achilla and for 75 acres yet the claim by Mr. Aradi was for 30 acres only. The decree stated that 75 acres would be taken from the Defendants' share in Bidii Farm. It indicated that the Defendants were Phoebe K. Achillah and D.R. Achillah. That the decree, P.Exhibit 9, was not in consonance with the award of the Tribunal. Further, the two defendants indicated in the decree were not administrators of the estate of Robert Edward Amtabi Achillah.
35. PW2 testified further that his father became registered as proprietor of some parcels of land in Bidii Farm. The first one was land parcel No. 31 measuring 5.06 hectares registered on 22/08/1995, a title deed was issued on that day to his late father. He produced as P.Exhibit 10 the Green Card thereto. The other parcel was No. 34 measuring 54.9 hectares whose title deed was issued on 22/08/1995. He produced its Greed Card marked P.Exhibit 11. He also produced the title deeds in respect of parcels number 31 and 32 as P.Exhibit 12 and P.Exhibit 13 respectively.
36. He stated that his grandmother sued Imbuguah K. Aradi and one Tom Nyakichanga in Eldoret High Court no. 101 of 1996. His father was not aware of the suit. In the plaint [P.Exhibit 14], she prayed for a declaration that the Tribunals' award was a nullity. The suit was finally dismissed on the 6/10/2004 [order produced and marked P.Exhibit 15] at which point Mr. Aradi had passed away on 14/12/2002.
37. He stated further that in another suit namely Kitale HCCC No. 117 of 1999; Dishon Rocky Achilla vs. Imbuguah Aradi, his father stated at paragraph 3 of his plaint [P.Exhibit 16] that he was the registered owner of parcel Nos. 31 and 34. He sued the defendant, Mr. Aradi for invading and using or occupying the parcels of land. The suit was dismissed. He testified that Mr. Imbuguah Aradi died on 14/12/2002. His Death Certificate was produced and marked P.Exhibit 18.
38. PW2 continued that his father knew that the land was subdivided when he saw a mutation form for the two parcels of land. The Mutation Form had parcel numbers 220, 221, 222 and 223. It was indicated that Dishon Rocky Achillah was the owner but it was signed by the Executive Officer of the Court. It was produced and marked P.Exhibit 19.
39. On 26/01/2000, the court wrote to the Land Registrar Trans Nzoia to issue title deeds. The Court did copy the letter [P.Exhibit 20] to the plaintiff. As a result, land parcel No. 223 was created. The first entry in the Green Card indicated that the proprietor was Dishon Rocky Achilla and the second entry established that Imbuguah Kiziiri Aradi was the proprietor. Entry No. 4 was the combination of the parcel number with parcel No. 224. The new acreage was 26.3 hectares, and it shows that it was a subdivision of parcel No. 34. He produced the green card of parcel No. 223 as P.Exhibit 21. The green card for parcel No. 220 was also made on 27/04/2000 and the first entry was Dishon Achilla. It was from parcel No. 31 and 34. He produced the green card as P.Exhibit 22. The first entry in the Green Card of parcel No. 31 is shown as the Government of Kenya. The second entry dated 22/08/1995, was Dishon Rocky Achilla who got his title deed issued on that date. The last entry was made on



- 29/04/2000 when the title was closed and new parcels Nos. 220 and 221 were made vide Kitale PMC Land Court Case number 72 of 1995. He produced the green card as P.Exhibit 23.
40. He testified that the green card for parcel No. 224 was made on 05/05/2000 in the name of Imbuguah Kiziiri Aradi. It showed that that parcel was an amalgamation of parcel numbers 21, 22, 30, 219, 221 and 223, all registered in the name of Imbuguah K. Aradi. The second entry made on 05/05/2000 shows that the title was closed and new numbers namely 225, 226, 227, 228, 229, 230 and 231 created. He produced the green card for parcel No. 224 as P.Exhibit 24. That parcel No. 225 had a green card showing the parcel as a subdivision of parcel No. 224. The title was issued on 05/05/2000. The plot measures approximately 8.355 hectares. It was still open. He produced the green card as P.Exhibit 25. The parcel was a subdivision of parcel No. 224. Its title also was in the name of Imbuguah Aradi and was issued on 05/05/2000. About entry number 6, it showed that the property was transferred to Lockmaster Limited on 21/03/2016. He produced the green card as P.Exhibit 26. Parcel No. 227 was a subdivision of 224 and measured 8.094 hectares. It was presently in the name of Imbuguah Aradi. He produced the green card as P.Exhibit 27. Parcel No. 228, also a subdivision of 224, measured 1.3183 hectares. It was in the name of Imbuguah Aradi. Its title was issued on 05/05/2000 and was still in his name. He produced the green card as P.Exhibit 28. Parcel no. 229, being a subdivision of the same parcel of land, measured 6.93 hectares and was in the name of Imbuguah Aradi. Entry No. 3 showed that it was transferred to John Agulinda while entry No. 5 showed that it was transferred to Malesi Ben Mugudo on 17/06/2013. He produced the green card as P.Exhibit 29. Land parcel No. 230 measuring approximately 6.25 hectares was also a subdivision of parcel No. 224. Its title was issued on 05/05/2000 in the name of Imbuguah Aradi. He produced P.Exhibit 30 the green card thereof. Land parcel No. 231 was a subdivision of parcel No. 224 measuring 5.31 hectares. It was in the name of Imbuguah Aradi. Its title was issued on 05/05/2000. He produced the green card as P.Exhibit 31.
41. PW2 continued that the surveyor conducted a survey on the status of the parcels and made a report dated 30/04/2019 [P.Exhibit 32] to which he attached aerial photographs. Further, on 10/11/2016, the plaintiff's advocates wrote a letter [P.Exhibit 33] to the Chief Magistrate Court requesting the court's intervention in obtaining file number Kitale PMC Land Case No. 72 of 1995 from archives in Nakuru. On 30/08/2017, the Court wrote back [P.Exhibit 34] indicating that the file had been retrieved. He also produced the Limited Grant of Letters of Administration, dated 26/06/2021, as P.Exhibit 35. He prayed for their reliefs enumerated in the Further Amended Plaintiff.
42. On cross-examination, PW2 stated that Robert Amutabi was a member of Bidii Farm Limited but his father, Dr. Rocky Achilla did not have a share in the Farm. Further, that when Bidii Farm awarded the land, his father's name was on the list of the awardees. The list he referred to was not among the documents he produced hence he could not confirm whether his father claimed shares or not in Bidii Farm. He could not confirm whether it was only his grandfather who subscribed to shares in Bidii Farm but his evidence was that both his father and grandfather appeared as shareholders in the Farm's List.
43. He admitted that his grandfather died in 1991. He did not show the properties registered in his late grandfather's name then. He stated there were no properties registered in the name of his late grandfather in Bidii Farm. He stated that the properties he referred to were registered in the name of Bidii Farm Limited as at the time his grandfather died. But before their grandfather died, Mr. Aradi was using part of the land for cultivation because the two were close friends. He stated that he was not informed that Mr. Aradi had a share but was sure that his grandfather had. He was not sure whether the land Mr. Aradi was cultivating was his part of the share because their shares were not separated on the land between his grandfather, Robert Edward and Dishon Rocky Achillah. He admitted that P.Exhibit 22 showed that it was a subdivision of parcel Nos. 31 and 34. He admitted that his grandfather had not been issued with the title deeds to his share.



44. He could not know as at the time of testimony whether anyone was occupying his late grandfather's share. He did not know that his grandfather sold 75 acres but he knew he sold 50 acres to a professor somewhere. He admitted that the individual shareholders' size of land in Bidii Farm was 190 acres. He could not confirm whether his late grandfather bought all his shares. He could not know whether the grandfather paid for all the 190 acres' share. He did not know whether that was how Mr. Aradi paid his late grandfather the sum of Kshs. 58,970.00 but he knew they were close friends. He could not confirm whether because of that agreement between Mr. Aradi and his late grandfather, he took 88.7 acres worth Kshs. 58,970.00. He couldn't confirm that it was the reason why his grandfather got 88.7 acres and gave Mr. Aradi land measuring 43.1 acres in Arable I and he got 32 and gave Mr. Aradi 19 acres thereof.
45. Further, PW2 admitted that he was not aware that in Vellei II, his grandfather got 26 acres and give it all to Mr. Aradi. Neither was he aware that in Vellei I, they agreed that all the land remains on in his grandfather's name. He could not know whether Mr. Aradi cultivated the 87 acres of his grandfather's land until his death. He stated that when the transactions were going on, the grandfather was working in Kapsabet and his home was in Maseno.
46. That the Kibomet Land Disputes Tribunal award was that his grandfather sold 59.4 acres to Professor Olembo of Maseno University. But before his grandfather's death, his father and mother were not staying in Bidii Farm. He could not know whether his mother used to visit Bidii Farm. He could not confirm whether it was because of the rapid sales of land that he and his grandmother moved to stop the sales. He could not know whether that was how his father and mother objected to the transaction between the grandfather and Mr. Aradi.
47. Regarding the Tribunal proceedings, he confirmed that Mr. Aradi continued to use part of the land even after the death of his grandfather. He admitted that the dispute before the Land Disputes Tribunal was between his grandmother and father. He said the proceedings showed the grandmother gave a version of the story in which she stated that Mr. Aradi should be given back his money so that he leaves the land. But the ruling was finally adopted as the judgment of the court. He admitted that on the date of adoption, the original plaintiff, the 1st and 2nd defendants were present and his father failed to take any action until 1999 when he noticed people encroaching onto their land. That from 18/07/1995, his father went to the lands office and got title deeds to pass the numbers 31 and 34 on 22/08/1995 after the court's decision. His further evidence was that the two were the titles his late father was claiming.
48. He admitted his late father and grandmother Phoebe filed a case against Kiziiri Aradi and Tom Nyakechanga but his father did not know of the case. Further, on 25/01/1995, his father wrote a letter complaining about Mr. Aradi's shares. He did not complain about his share. He only complained about it in 1999 when he stated that Mr. Aradi had encroached on his land being, parcel Nos. 31 and 34. The case, which became Kitale HCCC No. 117 of 1999, was dismissed for want of prosecution on account of the death of Mr. Imbuguah Aradi.
49. In 2016, his late father wrote about the Land Disputes Tribunal Award adoption. That the registration in his name was canceled in the year 2000, yet the record in Kitale PMC Land Case No. 72 of 1995 shows he was present on 18/07/1995. PW2 admitted that his father wrote 18 years later about the file. But he went on to state that it was so because it was difficult to trace the Court file.
50. About the fraud, he stated that the letter lists his father as one of the defendants yet he was not. That letter was written on 02/08/1995 by which time the Tribunal made their award. Also, that his late grandmother did not have Letters of Administration to the estate of his late grandfather. That the decree drawn was at variance with the Award of the Tribunal. He regurgitated that the decree also failed to point out that the original Plaintiff was not a party in the Tribunal dispute. When he was



shown P.Exhibit 5, he admitted that the 2nd name was that of his late father but in the body, he was not mentioned or shown as a party. He admitted his father did not object to the court's adoption of the Award. Even then, the decree was for 75 acres to be taken from Achilla's share, yet the claim was for 30 acres.

51. He stated further that Mr. Aradi took land, which was indicated in the decree yet the award was for 30 acres. He also stated that the other particulars of fraud were that Mr. Aradi quickly transferred the parcels of land on the same date, subdivided them into smaller plots and transferred them to make it difficult to trace. Regarding his father's land, he could not confirm whether he has a share but he stated that his grandfather sold part of it. And that is why the plaintiffs needed Mr. Aradi's share. He added that Mr. Aradi's estate was in occupation and use of the 75 acres to date.
52. On re-examination, he stated that the land reference before subdivision was 8815. That Bidii was a Limited Liability Company of which his grandfather was a shareholder. The grandfather died on 16/06/1991 and no Letters of Administration for his estate were taken out. Mr. Aradi used part of his grandfather's land for cultivation up to about 1995 when he brought in Professor Olembo. That was when he stopped using the land. PW2 could not confirm the exact date that happened but by 1994 when the Tribunal dispute was initiated Mr. Aradi had stopped using the land.
53. The Tribunal's finding was that Kshs. 40,000.00 was paid to Mr. Aradi for 30 acres which was to be taken from what he was to acquire from Mr. Achilla's share in Bidii Farm. That the proceedings referred to Phoebe Achilla but the decree referred to both Phoebe Achilla and Dishon Achilla hence the decree was at variance. Further, that the decree did not refer to parcel Nos. Kitale Municipality Block 17/ Bidii/31 and 34. He repeated the evidence about P.Exhibit 10, P.Exhibit 1818 and DMFI 16 which stated that what was in issue was "Transfer of Shares in Bidii Farm, the late E. A. Amtabi." Further, that the transfer was not approved because the procedure was grossly irregular. With that he produced P.Exhibit 16(b), a copy of the order made on 01/12/2014 and issued on 06/12/2014.

DeFendant's Evidence

54. The 1st Defendant DW1 adopted his witness statement dated 13/04/2023 as his evidence in chief. He also relied on twenty-nine (29) documents filed in his list of documents dated 06/03/2023 that were marked D.Exhibit 1-29. He testified that he had never come across any legal documents about the separate shares of Robert Amtabi and Dishon Rocky Achilla although he had seen a record of the shares of the late Robert Edward Amtabi. He said his father paid a subscription of the shares of the late Robert Amtabi. He Referred to a letter dated 02/08/1994 [D.Exhibit 2] which ascertained the shares of the late Robert Amtabi at 50%.
55. He could not recall when Robert Amtabi passed away but noted that the Certificate of Death revealed that it occurred on 16/06/1991. As at the time of the death of Robert Amtabi, there was no dispute between the deceased and the defendant's (now late) father, Imbuguah Kiziiri Aradi. There however arose a dispute between Imbuguah K. Aradi on the one hand and Phoebe Amtabi together with Dishon R. Achillah on the other. The issue was that the latter objected to the land Kiziiri Aradi was using pursuant to an agreement reached earlier on. The dispute was taken to the Land Dispute Tribunal. It was between Imbuguah K. Aradi and Phoebe K. Amtabi and Dishon R. Achilla. The outcome of the claim was adopted as the order of the court on 18/07/1995. During its adoption, the father of PW1, the plaintiff and the 2nd defendant were present. Thereafter, the land was registered on 22/08/1995 as parcel Nos. 31 and 34. They constituted what was given to the late Dishon R. Achillah and Imbuguah K. Aradi in accordance with the agreement entered before the Bidii Farm Company and which was adopted by the Tribunal. He referred to the Agreement as D.Exhibit 3 in which there was a narration that his father, Aradi, wanted 30 acres; that in Arable I, Mr. Aradi would get 43 acres;



- in Arable II, he would get 30.6 acres of which he gave Mr. Aradi 19 acres; in Vellei II, he got 26 acres of which he gave all to Mr. Aradi and in Vellei I, he received 46.8 acres of which it was agreed they remain with Mr. Achilla. He stated that in the Tribunal, his father was claiming more than 30 acres.
56. In cross-examination, he was referred to D.Exhibit 8, the decree of the court which showed that his father claimed 30 acres in Sabwani Group in Bidii Farm. He admitted that his father did not complain about the decree but instead he was awarded 75 acres. He admitted that the 75 acres were more than what he was awarded by 45 acres. He admitted that the proceedings before the Tribunal [D.Exhibit 3] showed that Imbuguah Kiziiri Aradi was the claimant. His Letter [D.Exhibit 2] to the Tribunal claimed that the dispute was between himself and Edward Amtabi Achilla who had died in 1991. Further, that both, Phoebe and Dishon did not have a Grant of Letters over the estate of the deceased.
57. He admitted that he had never seen any agreement between Imbuguah K. Aradi and Robert Amtabi. Further, that no such agreement was produced before the Tribunal. He said the Tribunal's verdict was in relation to the shares of Robert Amtabi Achilla and there was no order made against either Phoebe or Dishon or both. Regarding the Decree [D.Exhibit 8], the witness admitted that it showed that the defendants were Phoebe Amtabi and Dr. R. Achilla, yet Edward Amtabi was not a party.
58. He admitted that Bidii was a Limited Liability Company in which people, including his father, had shares. He had never seen a transfer of shares from Edward Robert Amtabi to his father Imbuguah K. Aradi. He admitted the decree did not refer to parcel numbers 31 and 34, and there was nothing in it to show that the shares referred to by the Tribunal comprised the two parcels of land. Further, he admitted that the parcels were registered in the name of Dishon Rocky Achilla, before the Tribunal there was nothing against him. That the 75 acres was subdivided from parcel Nos. 31 and 34. That Imbuguah K. Aradi died in December, 2002. When referred to the Letter dated 19/09/1995 [D.Exhibit 7], he stated that the court referred to Phoebe K. Amtabi and his late father only, and in D. Exhibit 6, the Letter dated 22/06/1995, the court did not address Dishon Rocky Achilla. He admitted further that after the 75 acres were subdivided, several parcels were disposed of, yet the Court at one time issued an injunction to the extent that parcel nos. 227, 228, 230 and 231 totaling 51.972 acres were still in the name of I. K. Aradi.
59. In re-examination, he stated that the proceedings before the Tribunal [D.Exhibit 3] showed in the statement of one Mr. Wakhungu that when Mr. Aradi was unable to pay, Mr. Achilla paid on his behalf. Further that later, they got a telegram that half of the land was to be used to pay the debts. The telegram was sent to Bidii Farm Limited. The company did not issue a Share Certificate except that the shares were contained in the minutes of the Company's meeting. That he had not been shown any supporting documents of ownership of the shares in respect of parcel numbers 31 and 34. He reiterated that the said Robert Amtabi never complained of his shares being taken by his late father. That both the estate of Robert Amtabi and that of Dishon R. Achilla had never moved the court for review of the adoption of the award by the court. He stated that the decree was not at variance with the decision of the Tribunal and the adoption was made when Phoebe and D. R. Achilla were present. No objections were raised for over 24 years.
60. The 2nd Defendant, DW2 adopted his witness statement dated 13/04/2023 and filed on 17/04/2023 as his evidence in-chief. He stated that he knew both Robert Achilla, Dishon Rocky Achilla and his father Imbuguah K. Aradi. That Robert and his father were partners in Bidii (K) Limited Farm. His father bought shares in the Bidii Kenya Limited, where he found Robert Archilla as a shareholder. In 1985, his father asked him to accompany him to Kapsabet where Mr. Archilla worked. It was to discuss over a matter on Bidii (K) Limited which required that each shareholder makes contributions. This is because Mr. Archilla was non-responsive hence they went to talk to him in relation to 150 acres set aside for which, Mr. Achilla, who was a civil servant then was not paying his share.



61. His father agreed with Robert Achilla that they find a suitable date to go to Bunyore, Mr. Achilla's ancestral home, to share over the matter with Phoebe the wife of Mr. Achilla. The meeting took place. DW2's father explained the consequence of not paying their contributions. Then they returned to Kitale. DW2's father decided to pay for the shares of Achilla. He paid Kshs. 58,000.00, equivalent to 150 acres. To the surprise of DW2, his father surrendered 75 acres to Mr. Achilla for the sake of his children. That was where Dishon Rocky was interred and built a home.
62. He added that the land which the Achilla's owned without contribution from DW2's father their family had since sold to other persons. The land was set aside from the 150 acres half of which his father gifted them. That they now owned less than 10 acres. That the claim by Dishon to part of Mr. Aradi's estate was misplaced because Robert did not pay for the 150 acres. Withal, the minutes a meeting in of Bidii (K) Company showed that it was Mr. Aradi who paid for the 150 acres in 1958. He stated there were no separate shareholdings between Dishon Rocky and Robert Amtabi. He was not aware of any dispute between Robert Achilla and Imbuguah K. Aradi. He added that the dispute before the Tribunal in Kibomet was a surprise to him since neither Dishon Achillah nor Phoebe Achila were shareholders in Bidii Farm nor had they purchased any from Robert Achilla. That it was surprising that Dishon Achilla had obtained title deeds to properties that belonged to DW2's late father without clear records as to how he administered the estate of his late father or purchased from his father.
63. On cross-examination, he admitted that Robert died in 1991 while his father, Mr. Aradi died in 2002. That he had never been a shareholder in Bidii Farm. That he was not the records keeping officer of Bidii Company vested with a secretary and a register of its members. That he did not know who kept the records of the company as at 1975. He also did not know who the company secretary was when titling was undertaken. He was not aware of the procedure, which took place before anyone was issued with title deeds from the company. That his father obtained title deeds from the company. He was not aware of which processes he underwent to get the titles.
64. He admitted that the best witness of the shareholding of Bidii Company Limited would be an official from the company. He admitted further that in his written statement, he indicated that his father had paid Kshs. 400,000.00 to forestall the auction of the farm owned by Bidii Farm Limited, but it did not have proof of it. He was not aware of any agreement between Bidii Farm Limited and his father about salvaging the farm from an auction. Neither did he know of any agreement between his father and the Company in the exercise. But he insisted that the payment was made in 1974 and 1975 for Bidii Farm. He stated that he and his father made only one trip to Kapsabet in 1985. There was no agreement reached between his father and Robert Achilla during the visit. On the subsequent trip to Bunyore, he did not see any agreement between the two. Later he drove his father to Bunyore, and no agreement was reached between the two.
65. When asked about what he wrote in the witness statement, he admitted that he wrote the same long after deliberations. That Imbuguah Aradi agreed to pay for the 150 acres. That the statement indicated that the agreement was reached in Kapsabet yet the truth of the matter was that the agreement was reached at home on Bunyore. He admitted the written statements did not refer to a visit to Bunyore and he did not mention any deliberations there.
66. He was unaware of shares transferred by the company to his late father and he could not confirm that. He also did not know if the company treated the discussions between his father and Robert as private. He admitted that he knew Christopher Ondari, the Chairman of the company who at the Tribunal gave evidence. Then he was cross-examined as to whether Robert raised the matter with the company, and he indicated that he did, but the company treated it as a private matter. He couldn't tell whether the company perfected the discussions between the two.



67. He admitted that both Phoebe and Dishon Achilla were not administrators of the estate of Roberta Achilla, even when his father commenced the claim before the Tribunal. By then Robert Achilla had died four years before. He admitted that in the letter dated 02/08/1994, his father wrote that his claim was between himself and Edward Amtabi Achilla. Further, the Tribunal directed that Mr. Aradi gets 75 acres from Mr. Achilla's shares but Mr. Achilla had since died.
68. He admitted that the proceedings indicated that Mr. Aradi received Kshs. 40,000.00 for 13 acres less than the 30 acres which Mr. Aradi had a right to acquire from Achilla's farm. In 1995, his father wrote to the court. He was not sure of the signature on the letter. In the letter, Mr. Aradi did not mention Dishon at all. Dishon was introduced as the 2nd defendant in the decree when 75 acres were raised, to be taken from Achilla's share in Bidii Farm. He admitted that the court decree did not mention parcel numbers 31 and 34.
69. In re-examination, he referred to the proceedings at page 4 where the Chairman of Bidii Company was asked whether he was aware of a telegram. Mr. Wafula also stated about the telegram. He stated that the proceedings referred to both Phoebe K. Achilla Amtabi and D. R. Achilla. The decree showed the same parties.
70. About parcel numbers 31 and 34, he stated that the dates shown on the titles issued on them were 22nd or last 1995. This was after the decree that was issued. Further, the titles were issued after D. R Achilla's letter [D.Exhibit 4]. He then stated he had not seen any company clearances to the Achilla that he be issued with parcel numbers 31 and 34. Also, there were no records from the company declaring that it resolved the dispute in relation to parcel numbers 31 and 34.
71. That the letter dated 21/01/1995 was written by D. R. Achilla. He did not claim to be a shareholder in Bidii Farm. By the time the letter was written, Mr. Achilla was working in the Lands Department. DW2 stated that he was unaware as to whether to date, anyone had taken out letters of administration in respect of the estate of Robert Achilla. Finally, that father bought land from Robert Achilla as shown in D.Exhibit 2 and confirmed by Festus Wakungu.
72. At the close of pleadings, parties filed written submissions supporting their position.

Analysis And Disposition

73. I have considered the parties' submissions, examined the evidence and analyzed the law. To understand the genesis of the dispute herein, it is important to lay out the kinship of the plaintiff. PW1 is the son of the late Dishon Rocky Achilla and Janet Akunava. Together with his mother, they obtained a limited grant of letters of administration of his father's estate on 26/08/2021. His father, who died on 09/04/2021, filed this suit during his lifetime.
74. The late Dishon Rocky Achilla had filed suit on the strength of the fact that he was the son of Robert Edward Amutabi Achilla, proprietor of all that parcel of land namely L.R. No. 8815, who died on 16/06/1991. That the said Robert Edward Amutabi Achilla was the husband to Phoebe K. Achilla. On the part of the defendants, the deceased Imbuguah Kiziiri Aradi was originally sued. Upon his death, his estate was represented by his clansmen.
75. According to PW1, the deceased Imbuguah Kiziiri Aradi, was out of good will, given a portion of the property by PW1's grandfather for purposes of cultivation. He at this juncture, did not have a title deed in respect to the suit property. The land was also never sold to him. However, Mr. Imbuguah Kiziiri Aradi took advantage of his kindness and began to lay credence as to ownership of the suit land.



76. The defendants on the other side claimed that pursuant to an agreement between Imbuguah Kiziiri Aradi and PW1's grandfather, Imbuguah Kiziiri Aradi lawfully used the said parcel of land. However, Phoebe Amtabi together with Dishon R. Achillah objected to its use. According to the agreement marked D.Exhibit 3, DW1's father wanted 30 acres; that in Arable I, he would get 43 acres; in Arable II, he would get 30.6 acres of which he gave him 19 acres; in Vellei II, he got 26 acres and in Vellei I, he received 46.8 acres of which it was agreed they remain with PW1's grandfather. That he was a shareholder at Bidii Company Limited.
77. It is on the strength of this agreement that he sued them before the Kibomet Land Dispute Tribunal seeking 30 acres. That he sued Phoebe Amtabi together with Dishon R. Achillah in the individual capacities. All the while, no letters of administration of the estate of PW1's grandfather had been obtained. The findings of the Tribunal culminated into a judgment of the court in Kitale PMCC. No. 72 of 1995.
78. Against that background, I postulate that the following issues fall for determination and which shall be analyzed sequentially: whether the Kibomet Land Dispute Tribunal had jurisdiction to hear and determine the land dispute? Whether the adoption of the Tribunal's findings was a nullity? What is the resultant effect of the transfers and subdivision arising from the original suit land? What orders are to issue?
- (1) Whether the Kibomet Land Dispute Tribunal had jurisdiction to hear and determine the land dispute?
79. PW1 clarified that while a limited grant was taken out on behalf of his father's estate, no grant of letters of administration had ever been taken on behalf of his grandfather's estate as at 1994. PW1 indicated that it was his grandfather and not his father that was a member of Bidii Farm owning L.R. No. 8815. It is on the strength of that reason that the suit seeks that it devolves and vests in the plaintiff.
80. This Court has carefully analyzed PExh. 1, the original Court file in respect of Kitale Land Case No. 72 of 1995. The proceedings therein are intriguing. In 1994, the Imbuguah Kiziiri Aradi whose Estate is the Defendant herein lodged a complaint before the Kibomet Land Dispute Tribunal. He, as the complainant in the Dispute, sued PW1's grandmother and not his grandfather, in spite of the fact that the Estate of the deceased grandfather remained, as by *Law of Succession Act*, Chapter 160, Laws of Kenya, to be the proprietor of the suit land. The dispute proceeded before the said Tribunal upon which a decision was made in favor of the defendant on 19/07/1994. Although not sued, PW1's father's name appeared in the proceedings. In its findings, the Tribunal ruled that the defendant was entitled to a share of PW1's grandfather's estate.
81. The Land Dispute Tribunal Act Cap 303A Laws of Kenya (now repealed) was the governing statute mandating the jurisdiction of Land Dispute Tribunals across the country. Section 3 of the Act limited the Tribunals' scope of jurisdiction to the division of, or the determination of boundaries to land including land held in common; a claim to occupy or work land or; trespass to land. Such that any other decisions made outside the scope of Section 3 would be a Tribunal engaging on its own frolic, ousted jurisdiction and resultantly a nullity.
82. In the present case, the Kibomet Land Dispute Tribunal, upon receipt of the complaint by the defendant, proceeded to award him 30 acres hived off from PW1's grandfather. The Tribunal did not determine a boundary dispute, a claim to occupy or work land or trespass to land. By giving the defendant herein 30 acres, the Tribunal arrogated itself jurisdiction power to give land to a party; a power that only vested in the court's jurisdiction. In my view, the decision to award accordingly went outside the limited scope of the Tribunal's jurisdiction.



83. Furthermore, and with great concern, I note that the defendant improperly filed the suit by failing to sue the right party. See the property was vested in PW1's deceased grandfather; a fact well known to him. It may have been what informed him to file the suit against his surviving wife in order to obtain the suit land from the back door. In the absence of any grant of letters of administration in his estate, no suit could lie against the suit land on a legal foundational basis.
84. Consequently, I come to the unwavering conclusion that not only was the decision of the Tribunal incompetent and improper but also illegal as to render the same a nullity. In the case of *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council said:
- “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.”
85. Consequently, I do not hesitate to find that the proceedings and resultant decision of the Tribunal is a nullity and of no legal effect.

Whether the adoption of the Tribunal's findings was a nullity?

86. Seeking to adopt this decision as the court's judgment, the defendant filed Kitale PMCC. No. 72 of 1995. On, 18/05/1995, the court summoned Imbuguah K. Aradi and Phoebe K. Amutabi to appear before it for adoption of the Tribunal's findings on diverse dates. It was ultimately adopted as the judgment of the court on 18/07/1995.
87. On 19/09/1995, the defendant wrote to the court seeking to extract a decree arising from the said judgment delivered on 18/07/1995. Peculiarly, when the decree was extracted, it included the name of PW1's grandfather yet he was not a party to the dispute at the Tribunal. Secondly, the award, made against PW1's grandfather, awarded the defendant herein 75 acres; yet the Tribunal awarded 30 acres.
88. Unbeknownst to his father, PW1's grandmother, dissatisfied with those findings, sued the defendant herein and one Tom Nyakichanga in Eldoret High Court no. 101 of 1996. In it, the plaintiff sought a declaration that the Tribunals' award was a nullity. The suit did not proceed on its merit as it was dismissed on 6/10/2004 for want of prosecution.
89. Taking cue from our earlier findings that the proceedings of the Tribunal were a nullity and of no legal effect, I find that the adoption of the judgment was similarly incurably bad. I however wish to address 2 things that were occasioned in Kitale PMCC. No. 72 of 1995; Firstly, the decree extracted purported to now introduce the deceased, in his own capacity as a party.
90. It is worthy of note that at this juncture, the deceased died in 1991 and 4 years later, he is cited as a defendant in Kitale PMCC. No. 72 of 1995. Was this proper? Our Court of Appeal was occasioned to address a similar scenario in the case of *Geeta Bharat Shah & 4 Others vs. Omar Said Mwatayari & Another* [2009] eKLR. In it, a suit was filed against two persons one of whom was already dead when the case was filed. Judgment was entered against the deceased. An application to set aside the judgment was disallowed and the applicants appealed to the Court of Appeal. The Court of Appeal held that the



judgment could not be sustained as it was entered against a person who was already dead. The court stated as follows:

“In the result, as Bharatkumar Nathalal Shah was already dead by the time the suit was filed, we hold the view that the suit was a nullity and Mr. Oddiaga, is with respect right in conceding the appeal in respect of him on that score. We see no merit in directing that he be allowed to file defence as he is not there to do so and the administrators to his estate cannot in law take over the matter as it was filed after he was already dead.”

91. Similarly, Mbogholi Msagha J (as he then was) in *Viktar Maina Ngunjiri & 4 Others vs Attorney General & 6 Others* [2018] eKLR reviewed various authorities as follows:

“In the Indian case of *C. Muttu vs. Bharath Match Works* AIR 1964 Kant 293 the court observed,

“If he (defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of plaint by substituting the legal representative of the deceased as the defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person.”

92. In yet another Indian Case of *Pratap Chand Mehta vs Chrisna Devi Meuta* AIR 1988 Delhi 267, the court citing another decision observed as follows:

“...if a suit is filed against a dead person then it is a nullity and we cannot join any legal representative; you cannot even join any other party, because, it is just as if no suit had been filed. On the other hand, if a suit has been filed against a number of persons one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void but the court has to strike out the name of the party who has been wrongly joined. If the case has been instituted against a dead person and that person happened to be the only person then the proceedings are a nullity and even Order 1 Rule 10 or Order 6 Rule 17 cannot be availed of to bring about amendment.”

93. This court takes the same approach. No judgment could be sustained against a party that never existed with the suit was filed ab initio.

94. Secondly, the trial court unilaterally enhanced the award sum from 30 acres to 75 acres; a variation from the original award granted. Not forgetting that the award was made against the deceased person. Section 7 of the repealed Act granted the magistrate’s courts powers to deal with decisions of the Tribunal as follows:

“The chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the magistrate’s court together with any depositions or documents which have been taken or proved before the Tribunal. (2) The court shall enter judgement in accordance with the decision of the Tribunal and upon judgement being entered a decree shall issue and shall be enforceable in the manner provided for under the *Civil Procedure Act*.”



95. The Court of Appeal in the case of Florence Nyaboke Machani vs. Mogere Amosi Ombui & 2 Others [2014] eKLR elaborated on this provision as follows:

“Once the award of Borabu Land Disputes Tribunal was adopted as a judgment of Senior Resident Magistrate’s Court at Keroka, it ceased to exist on its own. It cannot be the subject of a declaration. And even if it remained alive of what use will it be to declare it a nullity if the decree ensuing therefrom, by SRM’s court at Keroka does not face the same fate. The plaintiff has not invited this court to do so. I am sure that he was aware that that would have been an uphill task. The award having become a judgment of the court of competent jurisdiction can only be varied, vacated, set aside or reviewed either by the same court or by an appellate court in appropriate proceedings. That has not been done by the SRM’s court at Keroka nor have I been asked to do so in this suit. In any event I do not think that the SRM’s court at Keroka has jurisdiction under the Land Disputes Tribunals Act to review, vary, rescind, vacate and or set aside an award filed. The role of that court is merely to adopt the award as a judgment of the court on application and thereafter issue a decree. It has no jurisdiction to examine the award in order to satisfy itself whether it is bad in law and therefore void ab initio”

96. The defendants’ case was that since the plaintiffs were aware of the suit land, they slept on their rights to challenge the adoption of the decree. This could be discerned from the fact that on 18/07/1995, PW1’s father was in court when the adoption took place in Kitale PMC Land Case No. 72 of 1995. That they only awoke from their slumber in 2016 when PW1’s father wrote about the Land Disputes Tribunal Award adoption.
97. This court is a court of justice. This court will not turn a blind eye because of a technicality where it is apparent that illegal and unprocedural mechanisms were adopted by the subordinate court. A technicality cannot override an illegality. Our sovereign power is derived from the people of Kenya where in Article 1 (3) of *the Constitution*, we are called upon to perform our functions in accordance to *the Constitution*. To hold that the technicality remains superior over any other actions would in that very nature negate the duty called upon by this court.
98. As stated above, the role of a magistrate’s court is merely to rubberstamp the findings of the Tribunal insofar as they remain unchallengeable. It was thus wrong and improper for the trial magistrate to amend the parties and the substance of the judgment. I have said enough to conclude that the judgment adopted by the trial court was similarly void and must be set aside accordingly.

What is the resultant effect of the transfers and subdivision arising from the original suit land?

99. PW2 testified that his father became the registered proprietor of land parcel No. 31 measuring 5.06 hectares on 22/08/1995. He also became the registered proprietor of land parcel was No. 34 measuring 54.9 hectares on 22/08/1995. On the strength of these allegations, PW2’s father filed Kitale HCCC No. 117 of 1999; Dishon Rocky Achilla vs. Imbuguah Aradi, seeking to injunct the defendant. The suit was however dismissed.
100. In spite of the above, PW2’s father would later discover that his 2 suit lands were subdivided, as per the mutation form, to parcel numbers 220, 221, 222 and 223. Title deeds were subsequently issued therein in favor of Imbuguah Kiziiri Aradi. It appears that the said subdivisions arose from the strength of the orders granted in Kitale PMC Land Court Case No. 72 of 1995. Some of the parcels were subdivided further and sold to third parties. The plaintiff accused the defendant of committing acts of fraud following those above subdivisions.



101. The defendants on their part claimed that Imbuguah K. Aradi. father paid a subscription of the shares of the late Robert Amtabi vide a Letter dated 02/08/1994 ascertaining the shares of the late Robert Amtabi at 50%. In their view, the properties were properly subdivided and vested in the estate of the deceased.
102. Section 26 of the *Land Registration Act* provides that the certificate of title issued by the Registrar shall be taken as prima facie evidence that the proprietor is absolute and indefeasible owner of that parcel of land. However, ownership of such parcel of land can be subject to challenge if it is established that it was obtained on grounds of fraud, misrepresentation, illegality, absence of procedure or a corrupt scheme.
103. It has already been established that at the onset, PW1's grandfather did not have a title during his lifetime. Furthermore, no grant of Letters of Administration were obtained upon his death. However, on 22/08/1995, PW1's father became the registered proprietors of all those parcels of land namely 31 and 34.
104. Section 82 (b)(ii) of the *Law of Succession Act* states that "No immovable property shall be sold before confirmation of grant." This provision was expounded by the court in *In the Estate of Charles Mwaniki Kamara (Deceased)* [2021] eKLR where they adopted the reasoning of the court in *Njoki Gacheru Ndiuni vs Dadson Githenji Wahome & 3 Others* [2016] eKLR that held as follows:
- "The effect of this is that property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by law. Such authority emanates from a grant of representation, and any such person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence."
105. In the present case, I find that since no Grant of Letters of Administration were not taken out on behalf of the estate of PW1's grandfather, then the same could not devolve to his kin without following due process. I find that it was improper for a title deed to vest in PW1's father since no vesting order allowed for such transaction. I therefore find that it was obtained illegally and unprocedurally. Flowing from that, I find that any subsequent transfers and subdivisions were improper since at the onset, the action lacked any legal foundation.

What orders are to issue?

106. Having reasoned above, I find that to meet the ends of justice, the following orders are hereby issued:
- a. A declaration be and is hereby made that the proceedings and decision of the Kibomet Land Disputes Tribunal against a deceased person who had died on 16/06/1991 and without a grant over his estate having been applied for and obtained, was irregular and contrary to the law and are hereby rendered null and void;
 - b. A declaration that the decree extracted in Kitale Principal Magistrate's Court Land Case No. 72 of 1995 was irregular and improper and is hereby rendered null and void;
 - c. The titles issued in respect to parcel number Kitale Municipality Block 17/Bidii 31 and 34 are hereby canceled;
 - d. That the suit land namely L.R. No. 8815 shall revert back to the estate of the late Robert Edward Amutabi Achilla;



- e. The subdivisions arising from the judgment in Kitale Principal Magistrate’s Court Land Case No. 72 of 1995, following the adoption of the illegal and null decision of the Kibomet Land Disputes Tribunal, in respect to L.R. No. 8815 are hereby ordered to be canceled;
- f. A declaration be and is hereby issued that the execution of the decree in Kitale PMC Land Case 72 of 1995 by way of subdividing the original plaintiff’s land comprised in title numbers Kitale Municipality Block 17/Bidii/31 and 34 and transferring parcel Nos. 221 and 223 both with an acreage of 75 to Imbuguah Kiziiri Aradi was illegal.
- g. An order is hereby issued that the estate of the late Imbuguah Kiziiri Aradi moves out of the parcels of land within ninety (90) days of this judgment, failing which the estate and anybody claiming thereunder forcefully evicted;
- h. Since the plaintiffs have partially succeeded, each party shall bear its own costs of the suit.

107. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 29TH DAY OF APRIL, 2024.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE.

