



**Gitau v Gitau (Environment and Land Appeal E012 of 2022)
[2024] KEELC 4408 (KLR) (28 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4408 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E012 OF 2022**

JG KEMEI, J

MAY 28, 2024

BETWEEN

DOMINIC NJOROGE GITAU APPELLANT

AND

ELIZABETH MWIHAKI GITAU RESPONDENT

*(Being an appeal against the Judgment of the Hon Barbara Ojoo,
SPM in ELC No. 22 of 2019, Githunguri delivered on 13/1/22)*

JUDGMENT

Introduction

1. The Appellant who was the Plaintiff in the trial Court sued the Respondent (then 1st Defendant) vide an amended Plaint dated 4/4/2020. The Appellant claimed that he is the registered owner of the land parcel known as Githunguri/Nyaga/4XX measuring 4.3 acres (hereinafter the suit land) having obtained his title deed in 1968. That he built his matrimonial home thereon and cultivated the suit land and sometime in 1970, his father chased away his mother (the late Ruth Gathoni Gitau) and out of sympathy, the Appellant later settled his mother on part of the suit land. He contended that his mother occupied the said parcel of land alongside the Respondent who came along with his mother on her return. That in 2001 without his knowledge, the Respondent filed a case against the Appellant in the Land Tribunal case No. 29 of 2001 and obtained adverse Orders against him. Aggrieved, the Appellant approached the Court in Nairobi High Court JR 1488 of 2001 and successfully obtained Orders quashing the decision of the Tribunal. That despite the quashing Orders, the Appellant accused the Respondent (with the other 2nd and 3rd Defendants who are not parties in this appeal) of proceeding to subdivide the suit land into Githunguri/Nyaga 16XX and 16XX contrary to the Orders of the Court and without his consent.



2. That in 2008 the Appellant's mother passed on and during the burial, the Respondent and other family members attacked the Appellant and his family and razed down his properties forcing them to flee the suit land. The Appellant added that in 2010 he sought cancellation of the entry in HC Case No. 1488 of 2001 but the Court held that it was functus officio and directed him to file a fresh suit instead. He averred that the Respondent misinterpreted the foregoing Order as purporting to vacate the Judicial Review Orders in 1488 of 2001. Further the Appellant particularized illegality against the Respondent at para. 18 of the amended Plaintiff to wit causing the entry in the register and subdividing the suit land without authority; trespassing onto the suit land; effecting transfer of part of the suit land without the Appellant's consent and purporting to own part of the suit land.
3. In his amended Plaintiff, the Appellant urged the trial Court to enter Judgment as follows:-
 - a. An Order that Judicial Review Orders in Nairobi JR 1488 of 2001 dated 22nd May 2006, quashing the Land Tribunal Case No. 16/20/105/2000 are still in force.
 - b. A declaration that the subdivision of Land Reference Number Githunguri/Nyaga/4XX into Githunguri/Nyaga 16XX & 16XX, pursuant to quashed Orders was illegal irregular and illegal.
 - c. A declaration that the entry into the green card of Land Reference Number Githunguri/Nyaga/4XX pursuant quashed Orders was illegal.
 - d. A declaration that Land Reference Number Githunguri/Nyaga/4XX now Githunguri/Nyaga 16XX & 16XX solely belongs to the Plaintiff.
 - e. A permanent injunction against the 1st Defendant, their agents, servants, or in any manner restraining him from evicting the Plaintiff, developing, transferring, selling, charging, conveying, leasing or in any way dealing with Land Reference Githunguri/Nyaga 16XX & 16XX.
 - f. This Honourable Court be pleased to Order the 4th Defendant does rectify the title and green card of Land Reference Number Githunguri/Nyaga/4XX so as to remove the Orders in the Tribunal Case No. 29 of 2001.
 - g. This Honourable Court be pleased to cancel the any purported subdivision made or title issued pursuant the quashed Orders in the Tribunal Case No. 29 of 2001.
 - h. This Honourable Court be pleased to Order that the 1st Defendant be evicted from the suit property.
 - i. Costs of and incidental to this suit and interests at Court's rate.
4. In denying the Appellant's case, the Respondent filed her defence styled as "a reply to Plaintiff found on page 36 of the Record of appeal and contended that LR No. Githunguri/Nyaga/16XX belongs to her and her late mother, Ruth Gathoni Gitau. That the dispute touching on the suit land was heard by the clan elders at the Land Dispute Tribunal (LDT), the High Court and now this Court. The Respondent averred that the suit land is ancestral land having been born and raised there alongside her siblings. That her mother is buried thereat and a claim of trespass cannot arise over the land she calls home. That it is not clear why the Appellant filed the suit 12 years after the demise of their mother. She beseeched the Court to dismiss the suit with costs.
5. The Appellant in a rejoinder and denying the Respondent's averments, filed his Reply to defence dated 24/11/2020. He contended that the suit land belongs to him but was illegally subdivided into parcels



16XX and 16XX pursuant to Orders of the Land Dispute Tribunal which Orders were quashed by the Court on the 18/6/2002 thus null and void. He refuted the Defendants claim that the land is family/ancestral on account that he inherited the land from his grandfather and not his father and finally was issued with title on the 12/6/1968. That having been abandoned at birth by his mother, his grandfather extended compassion to him, took him as one his sons and gave him his own land alongside his real sons, his father included. It was his case that his mother returned to her matrimonial home but due to marital differences with her husband, Gitau, she was chased away. It is then that the Appellant took her in and settled her on his property. That the Respondent, who is a step sister, was not born on the land but entered the land with his mother. That upon her death he buried his mother on the suit land. In closing he challenged the Respondent to seek land from his father Gitau if indeed she is a child of the said Gitau.

6. The matter was set down for hearing on 4/3/2021. Upon hearing the parties and analyzing the evidence before it, the trial Court rendered its Judgment on 13/1/2022. In the main the suit was dismissed on grounds that the Judgement of the Court rendered on the 18/10/2002 was never executed and in line with the provisions of Section 4(4) of the Law of Limitations Act, the same was stale and therefore incapable of execution after 12 years.
7. It is this Judgement that has triggered the instant appeal.
8. Dissatisfied with the Judgment of the trial Court in Githunguri ELC Case No. 22 of 2019 delivered on 13/1/2022, the Appellant filed his Memorandum of Appeal dated 7/2/2022 on grounds THAT;
 - a. The Learned Magistrate erred in law in determining the matter on the basis of unpleaded matter of limitation of time.
 - b. The Learned Magistrate erred in law and fact in construing that the computation of time under Section 4(4) of the *limitation of actions act* runs from the date of Judgment only, instead of the date on which the Judgment was delivered, OR (where the Judgment or a subsequent Order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment OR delivery in question, thus erroneously computing the time as from 18th October 2002 instead of 31st March 2009, when the Appellant 's application for execution of high Court Judgment was filed.
 - c. The Learned Magistrate erred in fact in holding that the Appellant ought to have filed the instant proceedings in the High Court JR No. 1488 of 2001 while the Appellant had filed an application in the same Court and the same declined by Court.
9. The Appellant prays for Judgment that;
 - a. The Appeal herein be allowed.
 - b. That the Judgment of 13th January 2022 be set aside and substituted with an Order that the Appellant /Plaintiff case is merited and that Land Reference Githunguri/Nyaga/4XX now Githunguri/Nyaga 16XX & 16XX belongs to the Appellant /Plaintiff, that the subdivision of Githunguri/Nyaga/4XX to generate Githunguri/Nyaga 16XX & 16XX is null and void and the same should be cancelled, that the green card and title of Land Reference of Githunguri/Nyaga/4XX be rectified and the Respondent be evicted from Land Reference Githunguri/Nyaga/4XX.
 - c. That the costs of this appeal be awarded to the Appellant .



- d. Any further or other alternative relief and or Order that this Court may deem fit and just to grant.
10. The appeal was admitted for hearing on 6/2/2023. On the same day directions were taken and parties elected to canvass the appeal by way of written submissions.

Written submissions

11. The Appellant through the firm of Chege & Sang Co. Advocates filed submissions dated 6/3/2023. The Appellant drew four issues for determination which essentially are the grounds in the Memorandum of Appeal as captured in para. 1 above.
12. On the first issue, reliance was placed on the case of Ann Wairimu Vs. James Wambiru Mukabi [2021] eKLR where the Court of Appeal cited with approval its previous decisions in Sheikh Vs. Sheikh & Anor [1991] LLR 2219 and David Sironga Ole Tukai Vs. Francis Arap Muge & 2 Others [2014] eKLR on the Court's jurisdiction to determine issues as drawn by parties. That in this case the Appellant never pleaded the defence of limitation of time in terms of expiry of a Judgment and neither did it arise in evidence or defence.
13. Secondly in construing Section 4 (4) of the Limitation of Actions Act, the Appellant submitted that he obtained the Judicial Review Orders sometime in 2002 and moved to Court in 2009 to execute them. That upon his dismissal, he commenced the trial suit in 2019. That in light of Section 4(4) Limitation of Actions Act the computation of time ought to be from the date when the Respondents failed to deliver the suit property back into the Appellant's name, which ought to be construed from the date he filed the enforcement application being 31/3/2009. That accordingly the trial Court erred in computing time from the date of delivery of Judgment instead of the aforesaid date, 31/3/2009 thereby arriving at a wrong conclusion that the suit was statute barred.
14. In interpreting Section 4(4) of the Limitation of Actions Act the Appellant stated that the provision prevents any action based on a Judgment that is more than 12 years being brought in Court. That 12 years should be computed from the date of Judgment or from the default of payment or delivery of property if Judgment related to payment of money or delivery of property. That the Appellant moved the Court in 2009 but the Court held that it was functus officio and that a fresh suit for enforcement was needed hence the suit in the trial Court.
15. It was further submitted that applying the provisions of Section 4(4) of the Limitation of Actions Act, time should be computed from the date when the Respondents failed to deliver the suit property back to the Appellant's names which is 31/3/2009. That the Court erred in computing time for the expiry of Judgment from the 18/10/2002 instead of 31/3/2009 thus arriving at the wrong conclusion.
16. Reliance was placed on the case of Koinange Investments and Development Company Limited Vs. Ian Kahiu Ngethe & 3 Others [2015] eKLR that in a case where execution process is commenced before the expiry of 12 years, the process must be allowed to complete. That the Court erred in finding that the suit was time barred and yet the Appellant had commenced execution proceedings in 2009 and for that reason the Appellant ought to have been allowed to complete the process of execution.
17. Lastly the trial Court was faulted for finding that the Appellant ought to have filed the instant proceedings in the High Court JR 1488 of 2001 and yet the Appellant had been to the Court and his case was dismissed with reasons.
18. On her part, the Respondent filed submissions dated 5/7/2023. She framed three issues for determination namely; whether the trial Court determined proceedings on unpleaded matter; whether



- the trial Court erred in holding that the suit was time barred and when did time start running for purposes of the provisions of Section 4(4) *Limitation of Actions Act*.
19. On the first issue, the Respondent posited that the Court made its findings based on the pleadings and evidence that were placed before it and not on unpleaded matters as alleged by the Appellant .
 20. Relying on the provisions of Articles 159 (2) a, d and 10 (1)b of *the Constitution* of Kenya, the Respondent submitted that the Court is enjoined to exercise judicial authority to administer justice without undue regard to procedural technicalities.
 21. Further that according to the decision in *Odd Job Vs. Mubia* [1970] EA 476 the Court may base its determination on an unpleaded issues if it appears from the course followed at the trial that the issue has been left to Court’s determination. That the trial Court was properly within the law to base her reasoned Judgement on the ground of limitation of time.
 22. On computation of time under Section 4(4) *Limitation of Actions Act*, the Respondent submitted that time ought to be computed from the time of delivery of Judgment that is to say 18/10/2002 and not from the date of post Judgment proceedings (2009) as submitted by the Appellant . To support that proposition she cited the decisions in *Willis Onditi Odhiambo Vs. Gateway Insurance Co. Ltd* [2014] eKLR, *National Bank of Kenya Ltd Vs. Devji Bhimji Sanghani Builders* [2016]eKLR and *Alexander Mbaka Vs. Royford Muriuki Rauni & 7 Others* [2016] eKLR..
 23. The Court was urged to find the appeal lacks merits and dismiss it with costs.

Analysis & determination

24. As a first appellate Court, this Court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The Court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand.
25. This duty is enunciated by Section 78 of the *Civil Procedure Act* which espouses the role of a first appellate Court which is:

“78.

- (1) Subject to such conditions and limitations as may be prescribed, an appellate Court shall have power—
 - (a) to determine a case finally;
 - (b) to remand a case;
 - (c) to frame issues and refer them for trial;
 - (d) to take additional evidence or to require the evidence to be taken;
 - (e) to Order a new trial.
- (2) Subject as aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on Courts of original jurisdiction in respect of suits instituted therein.”



26. The duty of the first appellate Court has been affirmed in numerous decisions of the superior Courts. Notably in the case of *Selle & Another Vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was pronounced thus:

“... this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court ... is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

27. Having considered the appeal, the rival submissions of the parties and all the material placed before me I find the key issues for determination to be; whether the trial Court erred in determining the suit based on unpleaded issue of limitation of time; whether the proceedings were time barred in line with the provisions of Section 4(4) of the *Limitation of Actions Act*; if yes when does time start running costs of the appeal.

Whether the trial Court erred in determining the suit based on unpleaded issue of limitation of time

28. The role of pleadings in litigation cannot be gainsaid. Pleadings demonstrate what the cause of action is for the Plaintiff. Equally it is through pleadings that the Defendant is put on notice on the kind of case that he stands to face in Court. Pleadings also guide the Court on what issues to determine in the adjudication of the dispute of the parties before it.
29. It is trite that parties are bound by their pleadings and the Court pronounces itself on issues arising from pleadings and attendant evidence. However, and as an exception to the foregoing general rule, it is possible for a Court to determine unpleaded issues as demonstrated by caselaw discussed below.
30. The Court of Appeal in *Pacific Frontier Seas Ltd Vs. Kyengo & Another (Civil Appeal 32 of 2018)* [2022] KECA 396 (KLR) (4 March 2022) (Judgment) stated as follows regarding unpleaded issues:-

“As regards unpleaded issues, the principle is well settled that a Court, even when it has jurisdiction, will not base its decision on unpleaded issues because the issues determined by the Court must flow from pleadings. It is the pleadings which guide the litigation and succinctly inform the parties and the Court what is in dispute. However, where the parties lead evidence and address the unpleaded issues and from the cause adopted at trial it appears that the unpleaded issues have been left for the decision of the Court, the Court will validly determine the unpleaded issues. (See *Captain Harry Gandy v. Caspar Air Charters Ltd* [1956] 23 EACA 139; *Odd Jobs v. Mubea* [1970] EA 476, *D.E.N. v. P.N.N.* (supra), *Baber Alibhai Mawji v. Sultan Hashim Lalji & Another*, CA No 296 of 2001; and *Mapis Investment (K) Ltd v. Kenya Railways Corporation* (2005) 2 KLR 410). Nevertheless, we should add that parties cannot validly leave unpleaded issues over which the Court has no jurisdiction for it to decide, simply because parties cannot by consent, confer jurisdiction to a Court which in law it does not have.”



31. Earlier on the same Court in *Rawal Vs. Judicial Service Commission & Another; Okoiti (Interested Party); International Commission of Jurists & Another (Amicus Curiae)* [2016] KECA 534 (KLR) it was also held;-

“The principles of law on unpleaded issues, as stated by the Appellant, are correct and not in dispute. A Court will not determine or base its decision on unpleaded issues. Where however, evidence is led and it appears from the cause followed at trial that an unpleaded issue has been left to the Court to decide, the trial Court can validly determine the unpleaded issue. Accordingly, we need not belabour or restate the principles here in detail, save to mention but some decisions, which have crystallized those principles. These include *Captain Harry Gandy v. Caspar Air Charters Ltd* [1956] 23 EACA 139; *Odd Jobs v Mubea* [1970] 476, D.E.N. v. P.N.N. (supra), *Baber Alibhai Mawji v. Sultan Hashim Lalji & Another*, CA No 296 of 2001; and *Mapis Investment (K) Ltd v Kenya Railways Corporation* (2005) 2 KLR 410.”

32. Recently the Court of Appeal in *Joseph Ndafu Njulukani & 2 Others Vs. Emily Naliaka Barasa* [2023] eKLR Ngugi JA expounded on the exception to the forgoing general rule in the case of *Odd Jobs* supra as follows;-

- “76. It is probably prudent to unpack when the facts of a case would fit within the narrow *Odd Jobs* exception. In my view, it is only open for a Court to base its decision and grant relief on an unpleaded issue where the following conditions are met:
- a. When the issue the Court seeks to frame for relief is prominently germane in the evidence adduced by both parties and all the relevant matters respecting the issue have litigated and all the potential evidence made available to the Court and the only failure was the technical one of failing to request for the specific relief in the pleadings;
 - b. When the parties exhaustively addressed the issue for which the Court seeks to grant a relief;
 - c. When no useful purpose will be served by the matter being litigated in a different form except to unnecessarily prolong the litigation process;
 - d. When the dictates of substantive justice compel that relief be granted rather than requiring that a new matter be filed, for example, where the evidence before the Court shows that a party is likely to continue suffering oppression by the other party or where the new matter may be time barred;
 - e. When the relief is incidental or logically consequential from the pleaded matters and the Court comes to the conclusion that in spite of the deficiency in the pleadings, the parties knew the case and they proceeded to trial on the issue in question by producing evidence;



- f. When the failure to plead the relief was not a product of bad faith, tactical maneuver to give an advantage to the unpleading party. In this regard, some of the factors the Court considers is whether the party was acting in person as well as the circumstances in which the matter was filed. For example, some matters are filed in an emergency mode where drafting mistakes can be made due to the pressure of time. Anne Nyathira Case, for example, was a burial dispute which began as a request for a post-mortem exam to determine the cause of death; and
- g. When neither party will suffer objective prejudice if the Court grants the relief on the evidence adduced.

77. These factors are conjunctive not disjunctive: all must be present before a party can benefit from the exception. All these factors are based on an overriding fairness criterion: the need to ensure that the parties went into trial knowing all the rival case and led all the evidence not only in support of their contentions but also in refutation of those of the other side.”

33. In this case the question that the Court is called upon to inquire is whether the question of limitation of time of the Judgement entered into on the 18/10/2002 was pleaded. Order 2 rule 4(1) and (2) of the Civil Procedure Rules provides as follows;

- “(1) A party shall in any pleading subsequent to a Plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
 - a. which he alleges makes any claim or defence of the opposite party not maintainable;
 - b. which, if not specifically pleaded, might take the opposite party by surprise; or
 - c. which raises issues of fact not arising out of the preceding pleading.
- (2) Without prejudice to subrule (1), a Defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.
- (3) In this r. “land” includes land covered with water, all things growing on land, and buildings and other things permanently affixed to land.”

34. For the Court to answer this question it has to evaluate the pleadings and the evidence led in the trial Court.

35. The Plaintiffs cause of action as can be gleaned from the Plaint is that he is the registered owner of parcel 4XX having acquired it from his grandfather during demarcation of land in 1956. According to the green card he became registered as owner on the 14/11/1956 and title issued on the 12/6/1968. That in 2000 the Respondent and their mother Ruth Gathoni filed a suit at the Land Dispute Tribunal



Githunguri seeking a share of the land. After hearing the case the elders returned an award dated the 27/10/2000 which stated as follows;

- “ 1. Claimant No 1 and 2 Elizabeth Mwihaki and her mother Ruth Gathoni Gitau to share 1.70 acres jointly.
2. Objector Dominic Njoroge Gitau to share 2.60 acres jointly.
3. The Land Registrar Kiambu implement the partition through the Government Surveyor/Kiambu Survey office.”

36. That armed with the said Orders the Respondent and her mother caused the suit land parcel 4XX to be subdivided into two portions; parcel 16XX and 16XX.

37. Aggrieved with the said Orders the Appellant moved the Court in HC JR No 1488 of 2001 seeking Orders inter alia of certiorari and prohibition quashing the award of the elders on the basis that it was made ultra vires the powers and the mandate of the Land Dispute Tribunal. The Court (Mr Justice G P Mbiti as he then was) delivered the Judgement on the 18/10/2002 as follows;

“It is Ordered;

1. That the proceedings and award of the Land Disputes Tribunal Githunguri in its Land Case No. LND/16/20/105/2000 concerning L R Githunguri/Nyaga/4XX be and are hereby quashed forthwith on their removal into the High Court.
2. That the Senior Resident Magistrate be and is hereby prohibited from executing the decree arising from the said land case LND16/20/105/2000 as requested in SRM Court Githunguri Tribunal Case No 29 of 2001.
3. That the said Leave do operate as a stay of execution of any decree that the SRM might issue in his Tribunal Case No 29 of 2001.”

38. It was therefore the Appellant s case that the subdivision of his land and issuance of new titles was without his consent and in contrary to the Orders of the High Court in Judicial Review dated the 18/10/2002. And that the actions of the Respondent and her mother amounted to illegalities which were pleaded under para 17 of the Plaint.

39. At the hearing of the case at the trial Court, the Appellant led evidence that his grandfather gave him land in 1956 along with his other sons. That the reason why his grandfather treated him as his son is because he was abandoned by his mother when he was a toddler and having compassion on him his grandfather considered him as his son and not a grandson. That he settled on the land upon attaining adulthood, married his wife and raised his family on the land. That due to the mistreatment his mother faced in the hands of his father, Gitau, and out of love and consideration, he invited her to settle on the land. Her mother came along with young children one of whom was the Respondent. That all was well until 2001 when they filed the case at the Tribunal clamoring for a portion of his land. That his mother died in 2008 and buried her on his land amid a lot of commotion from the Respondent and relatives. That his house and property was razed down in the process. That in 2010 surveyors came to the land to subdivided the land into two portions at the instigation of the Respondent.

40. In his submissions the Appellant raised the following issues for determination by the Court;



- a. Whether the suit property formerly Githunguri 493 and now Githunguri/Nyaga 16XX & 16XX belonged and still belongs to the Plaintiff?
 - b. Whether that Plaintiff obtained Order to quash Tribunal Order of and whether the High Court Orders are still in force?
 - c. Whether the Defendant is entitled to share in the Plaintiff's property.
 - d. Whether the Defendants illegally subdivided Plaintiff's land.
 - e. Whether the Plaintiff has proved his case on a balance of probability.
41. The Respondent in her defence challenged the case of the Appellant and insisted that the land is ancestral land and that pursuant to the elders award the land was subdivided into two portions wherein parcel 16XX belongs to her and her mother Gathoni. That she and her siblings were born and bred on the land and therefore the issue of trespass does not arise. She wondered why the Appellant had filed suit about 12 years after the death of her mother Gathoni and sought the suit to be dismissed.
 42. In cross, DW1 maintained that she was the daughter of Ruth Gathoni and Gabriel Gitau 'A' though she did not have any document as proof. She conceded filing a case before the Tribunal in 2001 but said that she was not aware that the Tribunal decision was overturned. That her parcel no 16XX was an excision from the suit land No 4XX which was registered in the Appellant's name to hold in trust for them. She denied taking part in the Judicial Review proceedings.
 43. It would appear that the Respondent did not file any submissions in the trial Court.
 44. Going by my analysis of the pleadings, the rival evidence adduced by the parties and the submissions and the precedent laid out in the preceding paras in this Judgment, I find no pleading on limitation of time by the Respondent. I also find no cogent evidence from the course adopted at trial that would suggest that the parties identified and led evidence on unpleaded issues and further that the parties left the said unpleaded issues for the decision of the Court.
 45. For avoidance of doubt the Orders issued in JR 1488 of 2002 were of the nature of certiorari in which the award of the Tribunal was quashed. The Court notes that by the time the Orders were issued the Orders arising from the award of the elders had been executed so much so that on 25/6/2002 the following entries were entered on the title;
 - “2. 28.6.2002 Dominic Njoroge Gitau 2.60Acres Elizabeth Mwihaki Gitau }
1.70 acres as per Decree Ruth Gathoni Gitau } Tribunal Case No. 29/2001
Githunguri.”
 46. Interalia the Orders of the Court in JR 1488 of 2002 prohibited the Court from executing the decree of the elders.
 47. Certiorari is a latin term which means to be informed of, to be made certain in regard to. It is the name of a writ issued by a superior Court directing an inferior Court to send up to the former some pending proceeding, or all the record and proceedings in a cause before verdict, with its certificate to the correctness and completeness of the record, for review or trial; or it may serve to bring up the record of a case already terminated below, if the inferior Court is one not of record, or in cases where the procedure is not according to the course of the common law.
 48. The Court of Appeal in Kenya National Examination Council Vs. Republic Ex Parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR in allowing an appeal challenging the trial Court Judgment



directing the Appellant to release the Respondents' examination results that had been withheld due to irregularities, stated as follows in respect of prerogative writs;

“These provisions appear, on their face, to be complicated and confusing, but in reality they are not. In the old days in England mandamus, prohibition and certiorari used to be called “prerogative writs”. They were writs issued in the name of the King, or Queen to control inferior Tribunals from exceeding their jurisdiction. But as the progress of separation of powers continued apace in England, judicial power became the preserve of the Courts and apparently in 1938 the Parliament of the United Kingdom passed the Administration of Justice (Miscellaneous Provisions) Act, and by Section 7 of that Act the High Court could issue Orders, as opposed to prerogative writs, of mandamus, prohibition and certiorari. Section 8(1) supra, absolutely forbade out High Court to issue “Orders of mandamus, prohibition and certiorari” in situations where the High Court of Justice in England would have a similar power.”

49. An Order of prohibition is an Order from the High Court directed to an inferior Tribunal or body which forbids that Tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules or natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior Tribunal, or a wrong decision on the merits of the proceedings – See Halsbury's Law of England, 4th Edition vol.1 at Pg.37 paragraph 128.”
50. The effect of the Orders of 18/10/2002 were to nullify the entries made to the title on the 28/6/2002. The decision of the elders was also nullified as it was made by a Tribunal without any power in law and therefore its outcome was also null and void. In buttressing this point I rely on the case of *Macfoy vs United Africa Co Ltd* [1961] 3 All ER 1169, Lord Denning held as follows as regards the effect of a null and void act;:

“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.”
51. Effectively the land reverted to the Plaintiff as at 14/11/1956. The subdivisions and all the other entries on the title including the issuance of new titles having been a product of a process that the Court had quashed amounted to nought as well. In my considered view there was nothing for the Appellant to execute on the Orders of JR given by the Court. As explained in the Ruling and rationale of the Court in 2009, the Appellant needed to file a separate suit seeking for the cancellation of the titles issued pursuant to illegal Orders of the Tribunal.
52. In conclusion, the Court makes the following findings; that the Court erred in determining an unpleaded matter; the circumstances of this case did not offer the exception to the Court to determine an unpleaded matter; the parties did not identify an unpleaded matter nor left any unpleaded issue to the Court for determination.
53. Arising from the above findings I find no necessity to look into the 2nd issue as it now stands moot.
54. The trial Court therefore failed to determine the case of the parties and I am constrained to discuss the Orders sought by the Appellant on appeal as they are the very Orders that were sought in the trial Court and remain undetermined. Mandated under Section 78 of the [Civil Procedure Act](#) and to serve



the interest of justice the suit be and is hereby remitted to the trial Court for the determination by a different Judicial Officer.

55. The appeal partially succeeds in terms of ground No 1 alone.
56. Parties being related, I Order that each to bear their own costs of the appeal.
57. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 28TH DAY OF MAY, 2024
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of__;

Chege Kamau for Appellant

Respondent – present in person

Court Assistant – Phyllis

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