



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL NO. 21 OF 2016

BETWEEN

DR. KAWALJEET SINGH REKHI.....APPELLANT

AND

DR. PETER WAINAINA KAMA.....1ST RESPONDENT

THE DISTRICT LAND REGISTRAR KWALE.....2ND RESPONDENT

DIRECTOR OF SURVEY.....3RD RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Mombasa (Mukunya, J.) dated 19th September, 2015 in Constitutional Petition No. 50 of 2012)

JUDGMENT OF THE COURT

The appellant, **Dr. Kawaljeet Singh Rekhi** has preferred this appeal against a judgment of the High Court (*Mukunya, J.*) sitting in Mombasa dated 19th September, 2015, arising out of **Constitutional Petition No. 50 of 2012**. The subject matter of the said petition was a beach plot known as **Kwale/Galu/Kinondo/46** (“*the suit premises*”) measuring 1.7 hectares. The petition was instituted by the 1st respondent, against the appellant, the 2nd and 3rd respondents respectively.

The genesis of the petition and hence this appeal is **Land Dispute No. 12 of 2005** filed at Msambweni Land Disputes Tribunal in respect of the suit premises which was initiated by one, **Hamisi Mwalimu Mwabwagizo** and **Ramadhan Mohammed Tsolozzi** (“*Tsolozzi*”) as claimants against Stephen Mumu Kiringi and the 1st respondent, as the objectors. The basis of their claim was that they had inherited the suit premises from their late father and that the objectors had been registered as owners of the same fraudulently. The objectors never appeared or participated in the proceedings before the tribunal as they were neither served nor notified of the proceedings. However, the tribunal through a decision dated 7th June 2005 cancelled and revoked the 1st respondent’s title to the suit premises and gave Tsolozzi the suit premises to hold on his own behalf and on behalf of the other beneficiaries of their late father, **Mohamed Omar Mwasumba**. Following the tribunal’s decision, the claimants successfully applied to have the award adopted as a judgment of court through the **Chief Magistrate’s Court at Mombasa, Land Award No. 6 of 2005** which was granted followed by execution thereof.

Upon learning of the said developments, the 1st respondent sometimes in March 2006 instituted Judicial Review Proceedings in the High Court at Mombasa being **HC MISC. Civil Application No. 227 of 2006** seeking an order of certiorari to quash the judgment and orders of the Chief Magistrate's Court aforesaid and an order of prohibition to stop any dealings relating to and in respect of the suit premises on the ground that the tribunal had acted without jurisdiction and that the proceedings were conducted without him being served and therefore went on without his knowledge and/or participation which was contrary to the cardinal principles of natural justice. Though the application was opposed, the High Court through a ruling dated 9th February 2007 issued the orders sought. The appellants counsel would later, before this Court submit that, though the appellant had been served with the Judicial Review Proceedings as an affected person, he chose not to participate, because in his view, it would not have changed anything and as he had not specifically been named as a party. Tsolozzi however participated in the review proceedings as an interested party.

While the Judicial Review Proceedings were pending, Tsolozzi sold and transferred the suit premises to the appellant who became the registered owner by virtue of a Certificate of Title issued on 6th December 2005. The appellant subsequently sub divided the suit premises into two separate parcels namely **KWALE/GALU KINONDO/1632** and **KWALE/GALU KINONDO/1633**, herein-after referred to as **"1632"** and **"1633"** respectively. Following that state of affairs the 1st respondent filed the Petition in which the decision now impugned before this Court was made.

The 1st respondent's claim was anchored on the fact that he was the registered proprietor of the suit premises according to a title deed issued to him on 25th May 1977, and had been in continuous possession thereof since. That he only came to know that the suit premises had been sub-divided and registered in the name of the appellant after visiting Kwale Land Registry when he noted that his title had been cancelled and or revoked. He denied any knowledge of any previous proceedings in respect of the suit premises, the alleged subdivision thereof, or even the survey. He conceded though that by the time he obtained orders quashing the land tribunal's decision and its subsequent adoption by the Magistrates Court in the High Court on 9th February 2007, his title had already been revoked and the suit premises transferred and registered in favour of the appellant on 6th December 2005 and that the Green Cards in respect of the suit premises had been closed following its sub-division into two parcels on 28th June 2006 and new ones opened.

The 1st respondent denied any fraud on his part with regard to his initial acquisition of the suit premises while at the same time maintaining that there was collusion between the Kwale Land Registry officials and the appellant to fraudulently transfer the suit premises. He therefore prayed for various declarations on the basis that his constitutional rights under **Articles 40** and **47** of the Constitution were violated, an order of mandamus directing the 2nd respondents to revoke and cancel from the records the subdivision scheme that created 1632 and 1633 and reinstate the records for the title of the suit premises in favour of the 1st respondent, a mandatory injunction directing the 2nd respondent to cancel and revoke the new register/Green Cards issued in favour of the appellant, an order directing the appellant to surrender to the 2nd respondent to delete the appellant's names from the register/Green Cards No. 1632 and 1633 and reinstate the 1st respondent as the proprietor of the suit premises and finally an order of mandamus directing the 2nd respondent to delete the appellant's names from the register and reinstate the appellant's names in respect of the suit premises.

The appellant's case was that he purchased the suit premises from Tsolozzi in December, 2005 pursuant to the title deed issued to him on 3rd October 2005 in line with the tribunal's determination. On 14th November 2005 a sale agreement was executed between Tsolozzi and the appellant for the sale of the suit premises at a consideration of Kshs 5.3 million. The appellant was represented by counsel in the transaction who conducted due diligence through search which indicated that the suit premises were registered in the name of Tsolozzi. The appellant proceeded with the transaction and was registered as the proprietor thereof on 6th December 2005. Subsequently he caused sub-division of the suit premises resulting into 1632 and 1633. Prior to this, he was made aware of the Judicial Review Proceedings

initiated by the 1st respondent. However, he was least bothered as he had not been named therein as a party and therefore opted not to participate. Instead he pursued the sub-division process that was concluded on 28th June 2006. This was after he had caused the restrictions placed by the 1st respondent on the suit premises to be lifted.

It is prudent at this juncture to point out that the 1st respondent had on instituting Judicial Review Proceedings placed restrictions on the suit premises to bar any further dealings whatsoever pending the hearing and determination of those proceedings. However, the restrictions were placed on 1632 and 1633 rather than the suit premises. According to the appellant since the review proceedings related to the suit premises rather than the subdivisions, the appellant through his advocates complained and prevailed upon the 2nd respondent to lift the restrictions. It is also worth noting that among the pleadings served on the appellant on 24th March 2006 relating to the review proceedings was an order dated 23rd March 2006, issued by the High Court (**Maraga, J.**) (as he was then) granting the 1st respondent leave to apply for orders of certiorari and prohibition in respect of the suit property. Of more relevance to this appeal was that the leave so granted was to operate as a stay of all proceedings relating to or in respect of the suit premises until further orders of the court. Anyhow, the appellant's defence before the High Court was centered on the claim that he was an innocent purchaser for value without notice of any other party's interest. That he lawfully and rightfully acquired the suit premises and he deserved protection of the law. He contended that Tsolozi, from whom he had acquired his title, was the registered proprietor of the suit premises pursuant to a court order which had not been varied, set aside or reviewed by the time he purchased the suit premises. Further, that the orders quashing the decision of the Land Disputes Tribunal could not have had the effect of determining his interest as an innocent purchaser for value without notice. The appellant denied any fraud regarding his acquisition of the suit premises contrary to the allegation by the 1st respondent. **Mukunya, J.** having reviewed the evidence led by both the appellant and the respondents agreed with the 1st respondent that his constitutional rights had been violated and breached during the transfer of the suit premises to the appellant and in effect reinstated him as the proprietor of the suit premises. Aggrieved by that determination the appellant proffered this appeal raising 12 grounds which can be summarized as follows:-

That the learned judge erred in law and fact:-

- i. in finding that the appellant was not an innocent purchaser for value without notice;
- ii. in finding that the appellant was guilty of fraud and/or collusion without any pleadings and/or evidence to support the finding;
- iii. in finding that the appellant was liable for alleged irregular and/or unprocedural acts and/or omissions of the 2nd respondent;
- iv. in considering extraneous matters that went beyond the ambit of the proceedings, pleadings and evidence before him and hence arrived at an erroneous decision;
- v. in failing to appreciate that the appellant's title to the suit premises had crystallized before being quashed by the High Court;
- vi. in failing to appreciate that the decisions of the Land Disputes Tribunal and the subsequent one by the magistrate's court were valid until set aside, reviewed, varied and/or rescinded;
- vii. in not finding that the appellant did not violate, infringe or breach of the 1st respondent's constitutional rights;
- viii. in not considering that the appellant's title to the suit property could not be determined or addressed in the Judicial Review Proceedings;

ix. in failing to appreciate that the court had jurisdiction to adjudicate over and determine private land rights between the appellant and the 1st respondent in the forum of a constitutional petition; and,

x. in failing to consider the evidence and submissions of the appellant.

The appellant and the 1st respondent, who are the main disputants at the hearing of the appeal, filed their respective written submissions contemporaneously with their list of authorities which we have read and considered. The appellant submitted that the main reasons why Tsolozzi's title to the suit premises had been impeached by the High Court was because there was non-service upon 1st respondent of the proceedings in the tribunal as well as in the Chief Magistrate's Court and that the Land Disputes Tribunal lacked jurisdiction to adjudicate the dispute. To the appellant these were not reasons that were readily apparent on the face of the records at the lands registry at the time he purchased the suit premises. The appellant relied on the persuasive American case of; **Jojan Corp. v Brent, No. 1-98-0849** where it was held by the State of Illinois' appellate court that where a jurisdictional defect was not apparent on the face of the record at the time the rights of innocent third parties intervened, the petitioning party will be denied relief even from an otherwise void judgment or order. According to the appellant, the High

Court's order quashing the tribunal and Magistrate's Court decisions could not affect his rights in the suit premises even though the Tribunals' decision was void. The appellant further submitted that though he was not a party to the proceedings before the Land Disputes Tribunal, he had however placed reliance on its findings. This is because it is that decision, which was later adopted by court that led to Tsolozzi under whom he was claiming to be registered as the rightful owner of the suit premises.

The appellant further submitted that having relied on a valid court order he ought to be protected under the law rather than have his title impeached. That members of the public required that where someone had purchased property pursuant to a court order, they should not remain apprehensive that they may at a later stage be divested of their title. He asserted that he was a *bonafide* purchaser for value of the suit premises who needed to be reassured that he could rely on the facial validity of judicial proceedings which formed a chain link to his title. He relied further on yet another American case of **Petta v Host 115 N.E. 2d 881 (III. 1953)** where it was held that a party who stands in the position of a *bona fide* purchaser required to be protected in equity. However, the balance had to swing where "*far-reaching public interests were involved, namely the merchantability of titles passing through probate proceedings and the stability of public records which reflect the title to real property.*" The appellant was emphatic that having conducted due diligence before purchasing the suit premises, he became a bona fide purchaser for value without notice and that as such, he took the suit premises free of any interests of third parties. That our land tenure registration system required *bona fide* purchasers to be protected otherwise it would be useless and would further impair public confidence in certificates of title.

The appellant also submitted that his rights in the suit premises ought to be protected in accordance with the provisions of **sections 7, 28 and 143** of the

Registered Land Act (Cap 300 now repealed). The gist of these provisions is that a title cannot be cancelled unless it is proved that there was fraud, misrepresentation or mistake in registration to which the appellant was privy. That in the circumstances of this case, the appellant was an innocent third party in the transaction and had relied on the correctness of the land registry records to acquire rights over the suit premises. He went on to add that it would be contrary to the intent of law if everyone dealing with registered property had to inquire at every instance as to whether the title had been regularly issued. The appellant also submitted that the particulars of collusion alleged on his part by the 1st respondent were not stated or pleaded as required to enable him to ably respond to them. As such, the Judge erred in holding the appellant guilty of collusion with the 2nd respondent.

The 1st respondent in his opposition to the appeal began by stating that ours was a democratic society governed by the rule of law. That the rule of law as embedded in our Constitution dictated that public power was only legitimate when exercised lawfully. That the principle of legality is generally understood

to be a fundamental principle of constitutional law. For this proposition, he relied on several authorities; **Re-Arundhati Roy v Respondent [2002] 3 SCC 343, Bijay Mahanty v Jadu, Supreme Court of India, Appeal (crl.)441 of 1993, National Director of Public Prosecutions v Mohamed NO & Others [CCT44/02] [2-3] ZACC 4; 2003 SACR 561; 2003 [5] Law Society of South Africa & Others v Minister for Transport & Another [CCT] 38/10 [2010] ZACC 25.** He then proceeded to explain how he had acquired the suit premises. The 1st respondent, relied further on the case of **Asman Maloba Wepukhulu & Another v Francis Wakwabubi Biketi; KSM Civil Appeal No. 157 of 2001 (UR)** where this Court held that since the title relating to the suit premises in that case had been unlawfully interfered with by the bodies which lacked jurisdiction, then all the orders made by them were illegal, null and void. As such, the Court upheld the decision of the High Court to quash and vacate the tribunal and the Magistrate's court decisions. The respondent went further to submit that the substratum upon which the appellant had purportedly derived title to the suit premises had been completely destroyed by an order of the High Court against which no appeal was proffered. That since the tribunal that conferred Tsolozu with title lacked jurisdiction and there was breach of the *audi alteram partem* rule all subsequent actions by the 2nd respondent were all but a nullity.

The 1st respondent insisted that the appellant was duly served with the judicial review pleadings hence he was aware that the title to the suit premises was being questioned or was under interrogation. He imputed dishonesty on the appellant when he with full knowledge of pending litigation and in violation of the doctrine of *lis pendens* went ahead to sub-divide the suit premises. That in essence, by the appellant opting not to participate in the proceedings he was now bound by the final orders and was precluded/estopped/barrred by conduct and acquiescence from stating otherwise and he was deemed to have waived his rights to challenge the outcome.

Mr. Ngari learned State Counsel appearing for 2nd and 3rd respondents associated himself fully with the submissions by the 1st respondent and equally prayed for the dismissal of the appeal.

This being a first appeal, our jurisdictional contours as held in the case of **Seascapes Limited v Development Finance Company of Kenya Ltd [2009] eKLR** are that;

“As the first appeal, the Court of Appeal was enjoined to revisit the evidence that was before the High Court afresh, analyze it, evaluate it and arrive at its own independent conclusion, but always bearing in mind that the High Court had the benefit of seeing the witnesses, hearing them and observing their demeanor and giving allowance for that.

The broad issues falling for consideration in this appeal are;

- (i) Whether or not the appellant was an innocent purchaser for value without notice;
- (ii) Whether the appellant acquired or has any proprietary rights over the suit premises in the circumstances of this case; and,
- (iii) Whether any constitutional rights of the 1st respondent were breached or violated by the appellant.

In both the appeal before us and the petition in the High Court, the appellant has endeavoured to a great extent to advance his main argument and defense; that he was an innocent purchaser for value without notice of the suit premises. This appears to be the cornerstone on which the appellant's whole case is built. He claims to have acquired the suit premises without knowledge of any other rights attaching to it and acquired good title. It is therefore in order for us to inquire from the record whether indeed he was such a purchaser. The appellant has stated categorically that he conducted an official search dated 17th October 2005 which verified that the suit premises were registered in the name of Tsolozu. That based on that search he proceeded to purchase the suit premises. **Section 143 of Registered Land Act** provided as follows:-

“(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

As seen above, except in a case of first registration the court is empowered to order the rectification of the land register where fraud or mistake is established unless it can be shown that such proprietor had no knowledge of the omission, fraud or mistake or did not cause such omission, fraud or mistake or substantially contributed to it by his act, neglect or default. It is apparent from the record that the appellant was a purchaser for value as evidenced by the sale agreement and the various correspondence between his advocates and those of Tsolozzi on the payment of the purchase price. It may be pointed that his registration as proprietor of the suit premises was not a first registration. However, was the appellant clothed with the requisite *bona fides* for his defense to succeed?

The suit premises were adjudicated and registered as **Kwale/Galu/Kinondo/46** on 15th November 1974 in the names of Delfino Juma Mwatha and Stephen Muhu Kiringi as the proprietors in common in equal undivided shares. However, on 20th August 1977, the suit premises were transferred and registered in the sole name of Stephen Muhu Kiringi who later sold and transferred the same to the 1st respondent for a consideration of Kshs.50,000/- on or about 25th November 1977. Indeed, entry No. 4 on the Green Card shows the proprietor of the suit premises as the 1st respondent. That entry has never been cancelled and still stands, not even after Tsolozzi became registered as the owner of the suit premises due to the court order. Property buyers are always advised about conducting necessary due diligence before buying. This due diligence requires thoroughness to ensure that the prospective seller had good title to a property and includes historical searches on a land register to ensure that there are no prior entries that may affect the buyer's title. A historical search on the land register by the appellant, who was represented by counsel in the purchase, would have revealed the foresaid entry. Due diligence also requires a prospective buyer to do a physical inspection of the property to ascertain its physical location, those in occupation if at all and any fixtures thereon. The 1st respondent testified that he had been in possession of the suit premises since his acquisition to date. That assertion remained uncontroverted during trial. However, during the oral hearing of this appeal, counsel for the appellant submitted in rebuttal that indeed it was the appellant who was in possession. That in our view amounts to testifying from the bar which we must disregard. It might have served the appellant well if he had contested or claimed possession during the trial to enable the veracity of the claim to be tested. Suffice it to say that a physical inspection of the suit premises would have established whether the 1st respondent was in possession of the suit premises as he had claimed in his testimony. In the absence of any other evidence from the appellant to counter this assertion, the trial court had no choice but to believe the 1st respondent.

Be that as it may, the appellant was served with the pleadings relating to the Judicial Review Proceedings on 24th April 2006, which fact is not disputed. Infact the appellant conceded as much during hearing. Among the pleadings served on him was an order by the High Court stopping any dealings in the suit premises. However, with the full knowledge and in total disregard of that order, the appellant went ahead and pursued the subdivision of the suit premises into 1632 and 1633. This in effect caused the closure of the register relating to

Kwale/Galu/Kinondo/46. The Judge observed and rightly so in our view that, upon being served, the appellant must have known that there was a dispute in court regarding ownership of the suit premises between the previous owner and Tsolozzi. That the appellant must have known that the nature of the dispute was that Tsolozzi, through whom he was claiming the suit premises had illegally acquired title in his name. But instead of joining the proceedings to pursue or protect his rights, the appellant who had the benefit of counsel chose not, to claiming that he was not a party to the proceedings and that it did not

matter the outcome as it could not change anything. The trial court was not amused with this stand and observed:-

“It is obvious that the respondent was aware of the pleadings, the import and purport of Mombasa High Court Misc. Civ. Application No. 227 of 2006 before he subdivided Kwale/Galu/Kinondo/46. He knew that the title he possessed was under interrogation and was challenged by the applicant herein.”

That is a factual finding which this Court is bound to accept as it is based on evidence. Further the appellant was served with the proceedings pursuant to the provisions of **order 53 rule 3 (2)** of the Civil Procedure Rules which require that persons likely to be directly affected by the outcome be served to enable them participate in the proceedings if they so wish. It was therefore wrong of the appellant to be dismissive of the Judicial Review Proceedings served on him. The dire consequences of his actions are all there for him to see.

As stated in **Mawji v US International University & Another [1976 – 80] 1 KLR 229,**

“...only a foolhardy purchaser, or a fraudulent purchaser, would purchase a property which is actually the subject matter of litigation It would be a poor and insufficient system of justice, unethical to contemplate, if a successful plaintiff is forced to litigate again and again to restore the status quo either by further proceedings in the same suit or by a fresh suit if the property in dispute is transferred to a third party The law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party”

In essence this is about the doctrine of *lis pendens*.

Mulla and **Gour** in their treatises on the Indian Transfer of Property Act explain the doctrine further that:-

“... Every man is presumed to be attentive to what passes in the courts of justice of the state or sovereignty where he resides. Therefore, purchase made of property actually in litigation, *pendent lite*, for a valuable consideration, and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree on the suit”.

The doctrine therefore bars dealing with landed property under litigation to the detriment of the parties to the pending litigation. A transfer, if undertaken in those circumstances will really amount to nothing, and this is the case here.

It is quite obvious that the appellant embarked on the sub-division of the suit premises not in good faith but to defeat the possible outcome of the Judicial Review Proceedings. Having come to the conclusion that the appellant had knowledge of prior competing claims or interest in the suit premises, his defence that he was an innocent purchaser for value without notice cannot stand. Furthermore, that defence is one based on equity. As such, it requires one who seeks its aid to be of clean hands in line with the maxim that *‘he who comes to equity must come with clean hands’*. The appellant conduct however smacks of ill motive and mischief. As rightly observed by the trial Judge, any reasonable person, who also had the benefit of advice from counsel and acting in good faith, would have rushed to court and applied to be made a party to the suit to protect his interest. In dismissing the appellant’s claims of innocence, the trial court observed, and rightly so again in our view, that a party who extinguishes the subject matter of a suit, after being served with pleadings challenging ownership of his title in the subject matter could not come to court and plead *bona fides*.

Further, the appellant’s defense that he was an innocent purchaser for value is also based on **section 143 of the Registered Land Act**. However, that provision could not come to his aid since it stipulated that the register shall not be rectified by court so as to affect the title of a proprietor *who was in possession* such as

the 1st respondent and acquired the property for valuable consideration without knowledge or fraud. This is on the basis of the 1st respondent's assertion that he had been in continuous possession of the suit premises to date. Thus in essence, the provision on which the appellant hinges his case on works against him because unlike him who had knowledge of mistake and or omission none was imputed on the 1st respondent. The above is also in accordance with **Section 28** of the **Registered Land Act** which provides that the right of a proprietor whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of a court shall not be liable to be defeated except as provided by that Act. This position is also in line with **section 38 (1)** of the **Registered Land Act** which provided that:-

“No land, lease or charge shall be capable of being disposed of except in accordance with this Act, and every attempt to dispose of the land lease or charge otherwise than in accordance with this Act shall be ineffectual to create, extinguish, transfer, vary or effect any estate, right or interest in the land lease or charge.”

On the issue as to whether the appellant had or acquired any proprietary rights in the suit premises, we observe that; the person from whom the appellant claims title one **Ramadhan Mohammed Tsolozi** came to be registered as the owner of the suit premises in a flawed process. Though Tsolozi claims he inherited the suit premises from his father, the Land Disputes Tribunal in which he instituted his claim to assert his right lacked jurisdiction to hear and determine the dispute. Faced with a similar situation, the Court of Appeal in the case of **Jotham Amunavi v The Chairman Sabatia Division Land Disputes Tribunal & Another; Civil**

Appeal No. 256 of 2002(KSM) held thus:-

“It is clear that the proceedings before the tribunal related both to title to land and to beneficial interest in the suit land. Such a dispute is not in our view, within the provisions of section 3 (1) of the Land Disputes Tribunal Act. By section 159 of the RLA such a dispute can only be tried by the High Court or the Resident Magistrate's Court in cases where the latter court has jurisdiction.”

The appellant has relied on authorities from outside our jurisdiction to suggest that where a jurisdictional defect was not apparent on the face of the record at the time the rights of an innocent third parties intervened, the petitioning party will be denied relief even from an otherwise void judgment or order. He has also contended that public interest demanded merchantability of titles passing through court proceedings and the stability of public records which reflect the title to real property. That may well be so and may even be good argument but under our jurisdiction it is trite that where a court or tribunal lacks jurisdiction on a matter, the resultant acts are *void ab initio* and no amount of argument can render it correct. Thus the American decisions do not alter our position and in any event our land tenure system is not the same as that of the United States of America. To that extent those decisions are of little value. (See **Official Receiver & Provisional Liquidator Nyayo Bus Services Corporation v Firestone E.A [1969] Ltd [1998] eKLR**). In owners of the **Motor Vessel “Lilian S” v Caltex Oil (Kenya) Limited [1989] KLR 1**, it was held that:-

“.....where a court takes it upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

It follows that where a court or tribunal reaches a decision without requisite jurisdiction over the dispute then the resultant findings or orders are inconsequential. Further, and as emphasized in **Benjamin Macfoy v United Africa Co. Ltd [1961] 3 All ER, 1169**,

“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...”

Not only did the tribunal lack jurisdiction to entertain Tsolozzi's claim and as if to compound matters further, it proceeded without service upon the 1st respondent of the proceedings in the tribunal and the Chief Magistrate's Court. Yet at the time, the 1st respondent was the registered proprietor of the suit premises and with a title deed to boot. This was against a core fundamental right enshrined under

Article 50 of our Constitution, that is, the right to a fair hearing. The right to a fair hearing is so fundamental that if a decision is availed at without hearing a party, it is null and void. In the circumstances of this case there is no way the process leading to Tsolozzi acquiring title could confer good title on the appellant over the suit premises.

The 1st respondent claimed that his rights under Article 40 and 47 of the Constitution were violated. **Article 40** stipulates that every person has the right to acquire and own property. **Article 47** provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The trial court held that the 1st respondent's constitutional rights under **sections 75 and 77** of the former Constitution and under **Articles 35 (2), 40 and 47** of the Constitution to have been breached. To reach that conclusion, the Judge examined the process that led to the cancellation and revocation of the 1st respondent's title, not only leading up to the registration of the suit premises in the appellant's name but also in the lifting of restrictions placed on the register by the 1st respondent. As already stated elsewhere in this judgment, upon instituting the Judicial Review Proceedings, the 1st respondent placed restrictions to the suit premises. However those restrictions were lifted unprocedurally by the 2nd respondent in cahoots with the appellant which eventually led to the closing of the land register with regard to suit premises. The attendant section is **section 138** of the **Registered Land Act** which stipulates as follows;

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(1) The Registrar may at any time, upon application by any person interested or of his own motion, and after giving the parties affected thereby an opportunity of being heard, order the removal or variation of a restriction.

(2) Upon the application of any proprietor affected by a restriction, and upon notice thereof to the Registrar, the court may order a restriction to be removed or varied, or make such other order as it thinks fit, and may make an order as to costs.” (Emphasis added)

The above procedure was totally disregarded in lifting the restrictions for the 1st respondent was neither heard nor given notice before the restriction was removed by the 2nd respondent. Further the 2nd respondent whether deliberately or not registered the restriction on the resultant subdivisions yet the proceedings before court related to the suit premises. According to **DW1, Charles Kipkurui Ngetich** who testified on behalf of the 2nd respondent in the High Court the registrar then in office should have proceeded to reject the restriction on account that the land which it related to did not exist than the one envisaged by the Judicial Review Proceedings. However, the registrar proceeded to register the restrictions on 1632 and 1633. Further, that although it was the 1st respondent who had placed the restrictions, they were lifted by the 2nd respondent without any notice to him as required. That section as we have already demonstrated behooved the 2nd respondent to give affected parties an opportunity to be heard before ordering the removal or variation of a restriction. Of all the affected parties none could be said to have been more affected than the 1st respondent who had acted diligently in seeking to protect his interest in the suit premises by placing the restrictions. However, more directly is how the appellant and the 2nd respondent lifted the restrictions on the two subdivided parcels.

The appellant through his advocates prevailed upon the registrar to lift the restrictions on the basis that they related to different parcels of land. The appellant testified that the restrictions were lifted by consent from the 2nd respondent and his advocates. In order to open new Green Cards the 2nd respondent caused advertisement in the Kenya Gazette to the effect that the Green cards to the two parcels were lost or

misplaced. However, in cross-examination by counsel for the 1st respondent, he stated that the Green cards were in fact not lost, or misplaced or damaged. Indeed he even produced the Green cards to the two parcels in evidence. He also gave evidence that he never paid any monies for advertisement in the Kenya Gazette and for issuance of new titles contrary to the provisions of **section 156** of the Registered Land Act. Who if not the appellant then paid for those services? If this is not collusion or fraud, what is it? All these irregularities led the learned Judge to conclude that there must have been collusion between the appellant and the 2nd respondent to dispose the 1st respondent of the suit premises. The learned trial court therefore came to the conclusion that the rights of the 1st respondent were breached and we cannot fault given the evidence before him.

In our view the trial court exhaustively examined the evidence placed before it to rightly reach the conclusions it did. The conclusions were merited. This appeal therefore fails and is dismissed with costs to the 1st respondent.

Dated and delivered at Mombasa this 25th day of November, 2016.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR