IN THE COURT OF APPEAL

AT NAKURU

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 291 OF 2013

BETWEEN

WESTON GITONGA……1ST APPELLANT

DAVID MWANGI……2ND APPELLANT

NJOROGE NDUNGI……3RD APPELLANT

WAINAINA KARIUKI……4TH APPELLANT

DAVID NJIHIA……5TH APPELLANT

JOHN WATAKI……6TH APPELLANT

SIMON GICHUHI MUTHAKA……7TH APPELLANT

DUNCAN NJENGA……8TH APPELLANT

MARY NYAMBURA MUTHAKA……9TH APPELLANT

WANGI KARUME……10TH APPELLANT

NELIUS NYARUAI KANYANGA…… ……11TH APPELLANT

AND

PETER RUGU GIKANGA……1ST RESPONDENT

ELIZABETH WAKONYO KANYANGA……2ND RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nakuru (Anyara Emukule, J) delivered on 29th November, 2012

in

HCCC NO. 148 OF 2010)

****

JUDGMENT OF THE COURT

1. The suit from which the current appeal arises is ostensibly between the administrators of an estate of a deceased person and some trespassers of land in Ol Joro Orok, Nyandarua. But the issues raised before the trial court ran fairly deep. They ranged from factual land ownership or trespass, to legal issues of *res judicata*, limitation of actions, *estoppel* and abuse of court process. A brief examination of the salient facts will bring the appeal into clearer perspective.

2. In the 1970s, **Ol Joro Orok Salient** was a Settlement Scheme under the management of the Settlement Fund Trustees **(SFT)** whose mandate was to resettle landless citizens on reasonable terms. The land was subdivided into various plots and offered to various individuals for balloting. As relevant to this appeal, **Hellen Muringe Kibutha (Hellen)** was allocated **plot 1337** measuring 8.9 hectares (about 22 Acres) in 1974. In 1979, she asked for more land and was allocated plot **No. 2722** measuring 2.3 hectares (about 5.68 Acres). She was also given another plot No.1339 which was water-logged and the owner was compensated with another plot. After completing her SFT loan repayments, Hellen appears to have sought the amalgamation or consolidation of plots 1337 and 2722 which were adjacent to each other (with a road of access between them). However, a problem arose regarding the identity of the additional plot 2722 and the matter seems to have been dealt with through the offices of the Provincial Administration after which the Registry Index Map **(RIM)** was amended by the District Land Registrar enlarging Plot 1337 by an additional 2.207 hectares, making it 11.107 hectares (about 27.5 Acres) in size.

3. Through a mistake in the SFT records, however, it turned out that plot 2722 which had been given to Hellen was in fact **plot 2114** which had been allocated to **Gikanga Rugu (Rugu)** in 1982. SFT had so advised her, together with the Provincial Administration, in writing and asked her to return the receipt issued when she paid for the plot. She does not seem to have done so. After Rugu repaid his SFT loan in 1984, plot 2114 was registered in his name under the Registered Land Act on 15th August 1990 and a Title Deed issued to him on 3rd August 1992. He took possession in 1993 but found Hellen had moved in and taken possession.

4. Rugu went to court and sued Hellen for eviction in **HCCC 5299 of 1993** but before the case could be heard he died on 27th February, 1996. The suit abated after one year and was so marked by **Aluoch J.** (as she then was) on 18th June, 2003. In the meantime, Hellen had proceeded in the year 2002 to have the space occupied by the former plot 2114 subdivided into 39 sub plots (14566 to 14605). The following year, **Milkah Wacheke Gikanga** (Milkah) and **Peter Rugu Gikanga (Peter),** respectively the widow and son of Rugu **(deceased),** moved into two of the subplots Nos. **14570** and **14587** and occupied them. Hellen sued them as individuals before the Principal Magistrate's Court in Nyahururu in **PMCC 189 of 2004** but they denied the trespass and counterclaimed ownership of the entire plot 2114 which they contended had been swallowed on the ground by an illegal and fraudulent alteration of the RIM while they held the title in the name of the deceased. After hearing the parties, the Acting Principal Magistrate, **Mrs. G.A. M'masi,** gave judgment in favour of Hellen and dismissed the counter claim on 20th April, 2007.

5. Milkah and Peter filed an appeal to the High Court in Nakuru being **HCCA No. 74 of 2007** and applied for stay of execution pending the hearing. The stay was refused by **Kimaru J.** on 24th October, 2007 but the main appeal has yet to be heard and determined.

6. Milkah and Peter moved instead to the Succession Court in Nyahururu and filed for grant of Letters of Administration in the estate of the deceased in **PMCCSC No. 59 of 2007**. The grant was issued and later confirmed on 17th March, 2009 listing plot 2114 as one of the deceased's disposable properties. It was then distributed to several children of the deceased but they were unable to take possession because it had been occupied by various persons who claimed ownership through Hellen. On 1st July 2010, the Administrators filed suit against 11 of the purchasers in Nakuru **HCCC No. 148 of 2010** which was heard and determined by **Emukule J.** on 29th November, 2012.

7. The learned Judge heard the two administrators and Hellen, who was not a party to the suit but was called as the sole witness for the purchasers to confirm that they had acquired their interests through her. The Judge was satisfied after the hearing, that Hellen had used erroneous survey maps to enlarge her original plot 1337 and that the submerging of plot 2114 into that plot did not defeat the Title to plot 2114 which existed. Hellen held no interest in plot 2114 and could not therefore pass any interest to anyone else by purporting to subdivide it. Furthermore, none of the purported purchasers testified to show not only that they were purchasers, but also that they were *bona fide* purchasers without notice of the dispute over the plot. In the end it was held that plot 2114 rightfully belonged to the deceased and judgment was entered accordingly. The Judge made a further order that the Director of Surveys and the District Land Registrar together move into the land, carry out a survey and file a report on the proper boundaries of plot 2114 and the encroachment, if any, by Hellen and the defendants.

8. In making that decision, the learned Judge rejected objections raised in pleadings and submissions of counsel on grounds of limitation of actions, *res judicata, estoppel* and abuse of court process. The plea of *res judicata,* raised *on* account of PMCC No. 189 of 2004 which had been determined was rejected because the earlier suit was based on trespass limited to two plots and was against Milkah and Peter as individuals not representatives of the deceased's estate. At any rate, it was held, the issue of ownership of plot 2114 was not capable of determination by a Magistrates Court and was still at large.

9. On limitation of actions raised on the ground that the suit was filed long after the three year limit set for tortious acts of trespass, the learned Judge found that the issue in the suit was ownership of land, not trespass, and time did not begin to run against the deceased or the administrators of the estate. Furthermore, plot 2114 had been allocated to the deceased in 1984 and was discharged by SFT in 1992. The administrators of the estate of the deceased were entitled in equity to trace their rights and interest in the property and the time for doing so was not limited.

10. Those are the findings and orders that provoked the appeal before us. The memorandum of appeal listed eight grounds but none of them questioned the findings made by the trial court on the legal issues of limitation of actions, *res judicata, estoppel* and abuse of court process. We do not therefore have to deal with those issues in the appeal. Learned counsel for the appellants **Mr. Antony Mukira** consolidated the grounds of appeal and orally urged them as three grounds:-

(i). Whether the respondents had proved their ownership of plot 2114.

(ii). Whether the appellants were bona fide purchasers without notice.

(iii). Whether the judgment of the trial court was conclusive.

11. We think those grounds form the basis of the issues that we are called upon to determine in this appeal. As it is a first appeal, we have, in line with **Rule 29(1)** of the Rules of this Court, reappraised the evidence on record by way of a retrial in order to arrive at our own conclusions, even as we give due respect to the findings of the trial court. We have given allowance to the fact that we did not, unlike the trial

court, see or hear the witnesses. Nevertheless, we are entitled to interfere with the findings if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see ***Ephantus Mwangi v Duncan Mwangi Wambugu (1982-88) 1 KAR 278.***

12. On the first issue, Mr. Mukira submitted that the respondents based their claim on the evidence recorded in Nyahururu **PMCC 189 of 2004** where one **Thomas Morara Nyang'au**, a Registrar of titles from SFT, gave the history of the three plots - 1337, 2114 and 1341. Looking at that evidence, counsel surmised, it confirmed that plot 2114 came into being in 1991 and was discharged by SFT in 1992. It was not in existence before 1990 when it was plot 2722. The question then would be, asked counsel, if the respondents claim plot 2114 was allocated to the deceased in 1984 but it came into existence in 1991, in what form was it allocated? Was it amalgamated with 2722 or a subdivision of it? Counsel observed that Hellen had applied for and was given plot 2722 and the RIM was amended so that only one plot - 1337 - remained on the ground. In his view, plot 2114 never existed at any time and was not available for allocation to the deceased.

13. Responding to that issue, learned counsel for the respondents, **Mr. Kinyua Njogu,** submitted that there can be no question of the existence of plot 2114. That is because evidence was submitted in form of the Green Card and copy of the Register showing that it became registered as **Nyandarua/Ol Joro Orok Salient/2114** in the name of SFT in 1990 and was discharged in favour of the deceased in 1992. It measured 2.3 hectares and there was a certificate of search produced in evidence to confirm it. The respondents then became registered as the owners by transmission. According to counsel, the evidence of Nyang'au referred to in the previous case established that there was an erroneous allocation to Hellen which SFT corrected but Hellen continued to cling on plot 2722 which in their records was plot 2114. The witness gave clear evidence on the plots and therefore the submission of non existence of plot 2114 was misconceived, concluded counsel.

14. We have considered the first issue on the basis of the evidence on record and the submissions of counsel. In our view, there can be no doubt that plot 2114 legally existed in the Land Registry and there are clear documents and search records to certify that. The records show that SFT became registered as the owner of the plots in the Settlement scheme, at any rate plots 1337 and 2114 which are in issue, on 15th August 1990. Thereafter plot 2114 was discharged to the deceased on 23rd September, 1992 while 1337 was discharged to Hellen on 21 November 1993 and Titles were issued to them. There was a finding made by the trial court, correctly in our view, that the respondents were the registered owners of plot 2114 through transmission. On those facts, if the submission made was that plot 2114 did not exist at all, it would be an idle submission since the same argument can be applied to plot 1337 whose first registration was also in 1990. We are not at liberty to go behind these Titles.

15. The contention by the appellants, as we see it, is rather that plot 2114 did not exist on the ground before 1990 and therefore the deceased's claim of ownership was illusory. But that cannot be so. In the previous case filed by Hellen **(PMCC 189/2004)**, she admitted that she had known the deceased as well as the respondents here as fellow settlers since 1982. She explained how she was shown her plot 1337 in 1974 and then continued to testify as follows:-

> ***"Gikanga was given land. I do not know when he was given. His piece of land is 2114. There is a road between his shamba and mine. The public road is being used. He settled on his land in 1982. There was another plot Gikanga built a house in his plot and left in 1986. He came and started staying there and developing the land.***
>
> ***In 1992 I received a letter from the Land Registrar that there was a dispute. I do not have the letter with me. He said the same was boundary dispute. The Land Registrar visited the shamba all the persons concerned we sat. There were 3 pieces involved in the boundary dispute. My plot 2114 of Gikanga and 1349 of Ruth Kiuna. Ruth Waithera Kiuna is the one who instituted the boundary dispute."***

16. In her evidence before the trial court in this matter, Hellen reconfirmed that evidence as follows:-

> ***"I know the 1st plaintiff, I do not know if 2nd plaintiff knew him in 1984 when they built next to me. They were brought in a vehicle by a Settlement Officer. The 1st plaintiff's father was Rugu Gikanga. They were shown plot 1340 – but Title said – plot 2114. There was a road between us – they lived there for over 20 years."***

17. So that, there is not only admission that plot 2114 existed before 1990, but also that a dispute arose between plot 2114, 1337 and 1341 as the registration and transfer processes dawned in 1992. Plot 1337 was then registered with an area of 11.1 hectares or 27 acres although it was originally smaller. This was Hellen's explanation:-

> ***"I was allocated Plot No. 1337 in 1974, through balloting. I was allocated by the Settlement Fund Trustees. There was no other body allocating the plots. By then the acreage was 8.9 hectares. 1974 which is approximately 22 acres. The initial documents letter of allotment, I misplaced. The discharge I have it with me. I was not allotted 5 acres.***
>
> ***2/10/89 DMFI(1) shows I was allocated approximately 5.1 acres. But I wish to state that even if one was getting 20 acres it was being approximated to 5 acres. The title shows I was given 8.9 hectares. The area now shown is 11.1 hectares.***
>
> ***From abstract of title the area is 27 acres thence the amendment increased the area by 5 acres.***
>
> ***In 1974 I settled on my plot Number 1337. I can't remember receiving a letter stopping me from developing the plot next to mine. I have never balloted for any other plot in that scheme. I was allocated plot Number 1339 in 1982. Plot No. 1339 was next to my plot.***
>
> ***P. exhibit 16 on the Map I have produced it was included in plot Number 1337. I have no document I have for plot No. 1339. I do not have a plot receipt or any documentation. I do not have a title deed. It is not shown on the map (P. exhibit 16).***

I wrote a letter to the Land Adjudication Officer on 1/2/91 requesting them to allocate me a plot 2722; 1339 (DMFI(2). I am not aware plot Number 2722 was given a new number which is 2114. The heading of the meeting before the District Officer's office shows plot Number 2722 the new number is 2114.

From my application I was allocated a plot I have no document to show that I was allocated plot Number 2722.

In the letter DMFI(2) I said I had developed the plot unknowingly. I have never vacated that plot. I am still occupying and developing it. Vide the said letter I was asked to stop developing the area (DMFI(3) 18/9/90)."

18. That is the dispute alluded to by Nyang'au in his evidence which was evaluated by the trial court, stating:

"According to his records from what he called (final list) the areas of the three plots were as follows -

(1) Plot 1337 is 8.9 ha

(2) Plot 2114 is 2.3 ha

(3) Plot 1341 is 6.4 ha

DW3 also testified that the old Number of Plot 2114 was 2722. He testified further that the Hellen Muringe Kabutha applied for allocations of Plot 2722 on 1.02.1991 and she even received a letter of offer, and also paid for the plot. However upon realization by the Director of Lands and Settlement that there was misinformation from the Provincial Administration confirmed in writing that the plot belonged to Gikanga Rugu. Hellen was asked to surrender the receipt for payment of Plot 2114 (former Plot 2722) and despite being asked not to develop the plot, Hellen went ahead and had this plot and plot 1337 "amalgamated" or "consolidated" to become 11.107 Ha, and had the area maps changed to suit her area of possession and occupation."

19. From all the above, Hellen appears to have proceeded against clear directions of STF which was the lawful authority for allocation of plots, and altered the situation on the ground. We find on the evidence that plot 2114 existed on the ground before formal registration in 1990 and that it was owned by the deceased who lawfully transmitted it to his heirs. Ground one of the appeal is rejected.

20. On the 2nd issue, Mr. Mukira submitted that there was nothing wrong with failing to call any of the appellants as witnesses since they were only purchasers and the seller was available to confirm that. That is why their sole witness was Hellen. He cited the case of ***Julianne Ulrike Stamm v Tiwi Beach Hotel Ltd [1998] eklr*** where this Court stated as follows:

"The hearing of suits is governed by the procedure provided in order 17 of the Civil Procedure Rules. Order 17 rule 2(1) reads:

'2(1) On the day fixed for hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.'

There is no reference in this rule to plaintiff himself, giving evidence first or at all. But a plaintiff is bound to produce evidence in support of the issues, which he is bound to prove and which evidence can be given by any competent witness not necessarily himself. A plaintiff does not have to be personally present when he is represented by duly instructed counsel as was the case here. It is for a plaintiff's counsel to decide how to prosecute his case. If a plaintiff can prove his case by the evidence of someone else he does not have to be present at the hearing of the suit. Similarly, if a plaintiff can prove his case by means of legal arguments only, he does not also have to be physically present at the hearing of the suit so long as his advocate is present to prosecute his suit. In short, according to Order 17 rule 2(1), a plaintiff can prove his case by the evidence of a witness or witnesses other than himself, or by the arguments of his counsel."

21. In response, Mr. Njogu conceded the general principle that a party can prove a case by evidence of a witness other than himself but distinguished this case which, in his view, required the appellants to prove that they were not only purchasers but *bona fide* ones in order to enjoy any protection under the law. In counsel's submission, Hellen could not, and did not, prove that they were innocent and the trial Judge cannot be faulted for his finding.

22. We have considered the issue and agree with this Court's decision in the ***Stamm case*** (supra) on the construction of ***Order 17 rule 2(1)*** of the Civil Procedure Rules. However, the appellants in this case had pleaded in paragraph 6 of their joint defence that they had *"purchased their respective occupied plots from Hellen without any notice of the plaintiffs' claim."* It was a legal defence of an innocent purchaser for value without notice. The onus is on the person who wishes to rely on such defence to prove it, and the defence is against the claims of any prior equitable owner.

23. **Black's law Dictionary 8th Edition** defines "*bona fide* purchaser" as:

"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."

24. In the Ugandan case of ***Katende v. Haridar & Company Limited [2008] 2 E.A.173*** it was held:-

> ***"For the purposes of this appeal, it suffices to describe a*** *bona fide* ***purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the*** *bona fide* ***doctrine, (he) must prove that:***
>
> ***a. <u>he holds a certificate of title</u>;***
>
> ***b. <u>he purchased the property in good faith</u>;***
>
> ***c. <u>he had no knowledge of the fraud</u>;***
>
> ***d. <u>he purchased for valuable consideration</u>;***
>
> ***e. <u>the vendors had apparent valid title</u>;***
>
> ***f. <u>he purchased without notice of any fraud</u>;***
>
> ***g. <u>he was not party to any fraud</u>.***

[Emphasis added].

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner."

25. As stated earlier, none of the appellants testified at the trial and the learned Judge had this to say:

> ***"Though the Defendants may be innocent purchasers for value without notice, and though Hellen Muringe Kabutha tendered evidence to that effect, as seller of the plots to the Defendants, she produced no evidence of Sale Agreements or evidence of any payments received by her and the Defendants. For the Defendants to benefit from the doctrine of innocent purchasers for value without notice, they needed to testify to that effect. Both value (in terms of consideration), and notice are questions of fact. I doubt very much whether the Defendants can claim ignorance and innocence of the long running dispute between the plaintiffs herein or Gikanga Rugu under whom the plaintiffs claim, and the said seller Hellen Muringe Kabutha. There is therefore no basis of law or fact for me to make a finding that the Defendants are innocent purchasers for value and without notice."***

26. We have re examined the evidence on record ourselves and it is clear that only eight of the appellants were said to have purchased although there were no written agreements made. According to Hellen, these were people displaced in tribal clashes who were seeking relocation and who simply came to her, paid what she asked for and she showed them where to settle. Only one of them had a title. In sum, none of them proved the elements stated in the ***<u>Katende case</u>*** (supra) that he/she ***"holds a certificate of title; purchased the property in good faith; had no knowledge of the fraud; purchased for valuable consideration; the vendor had apparent valid title; purchased without notice of any fraud; was not party to any fraud."*** **Like the learned Judge, it is our view that there ought to have been evidence on knowledge and good faith from the appellants. No one else could enter into their psyches and testify to that. Without it, it would not matter that Hellen authorized them to occupy the disputed land. She had no legal or other interest to pass to them. We think in those circumstances, the learned Judge had a proper basis in law to make the findings he did and we therefore reject the second ground of appeal.**

27. Finally, Mr. Mukira submitted on the third ground that the judgment of the trial court was inconclusive and therefore invalid. That is because after the judgment, the Judge made an order for further evidence in form of a survey report which was carried out but the parties were not called upon to call their own further evidence or to question the report. In his view, the survey report was separate from the main judgment and it was the one relied on subsequently to evict the appellants. It follows, in counsel's view, that the impugned judgment was incomplete.

28. In response, Mr. Njogu submitted that the intention of the order made in the judgment was no more than seeking clarity on boundaries in order to enforce the decree. The Judge, in counsel's view, was thinking outside the box which was necessary in this case and the propriety of the order was vindicated when the survey report was filed.

29. The Order complained about was part of the Decree dated 29th November 2012, issued by the court on 23rd January 2013 and stated as follows:

> ***"That an order be and is hereby issued to the Director of Surveys and District Land Registrar, together to carry out within 120 days from the date hereof a survey to establish the exact area and extent of plot No. 2114, vis- a- vis plot Nos. 1337 and 1341 at Ol joro orok Salient in Nyandarua District and file their report in court detailing the proper boundaries of plot No. 2114 (formerly plot No. 2722) and the extent (if any) of the encroachment by the defendants and Hellen Muringe Kabuthu."***

30. Despite resistance by Hellen in a separate suit reported as ***<u>Hellen Muringe Kabutha v Nyandarua District Land Registrar & 5 others</u> [2017] eKLR*** which was dismissed as ***res judicata,*** **the order was complied with and a report was filed by the** District Land Registrar dated 28th March, 2013 stating:-

> ***"Parcels of land No. 1337, 1341 and 2114 have been subdivided on the ground and there are erected several houses.***

Parcel No. Ol joro orok Salient/ 1337 has been subdivided into parcels No. 16643-16651.

Parcel No. Nyandarua/Ol joro orok Salient/ 1337 has been subdivided into parcels No. 14567-145605. From the measurements taken on the ground it was found that the resultant subdivisions No. 14567-145605 emanated from Parcel No. Ol joro orok Salient/ 2114…..” *[Emphasis added]*

31. The Decree made a final declaration that the respondents were the legal owners of plot 2114; that the appellants herein be evicted therefrom; that the appellants' houses and other structures on plot 2114 be demolished; and that a permanent injunction be issued to restrain further entry into the plot by the appellants or anyone else. The issue that arises is therefore whether the Decree was final when it contained the further Order reproduced above.

32. Section 2 of the Civil **Procedure Act** defines ***'Decree'*** and ***'Order'*** as follows:-

“decree” means “the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final”. “Order” on the other hand means “the formal expression of any decision of a court which is not a decree.”

It explains a ***'preliminary decree'*** thus:

“a decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final”.

Addressing a similar provision in the ***Indian Civil Procedure Code,*** **Mulla** at page 12 of the 13th edition states:

“A preliminary decree is one, which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then as a result of the further enquiries conducted pursuant to the preliminary decree, the rights of the parties are finally determined and a decree is passed in accordance with such determination”.

33. It seems to us that the decree ensuing in this matter was partly preliminary and partly final, but nevertheless a decree that was capable of execution. There is no doubt that the rights of the parties that arose from the suit had been finally determined. The order that was made as part of that decree was meant to effectuate it and not to create any new cause of action. The order was complied with and the appellants had an opportunity of challenging it in this appeal. It was a far cry from the type of order made by the trial court in the case of ***George Nyakundi Ombaba v Attorney General [2017] eKLR*** that:

"..the plaintiff shall be paid his arrears of salary and other benefits for the period dating back to 27/06/2003 less statutory deductions. The exact amounts to be paid shall be assessed by the Registrar or Deputy Registrar of this Court taking into account the applicable time of service of the plaintiff."

After receiving the Registrar's assessment, the trial court changed its decision and was severely rebuked by this Court on appeal when it stated:-

“***This is the most ludicrous, or preposterous, situation that we have come across in our careers, where a Judge hears a matter, renders a judgment, and then revisits the same two years down the line and vacates the reliefs given in the earlier judgment and substitutes them for others. This has created a rather bizarre situation where we have the appellant appealing against the subsequent Ruling, described by the learned Judge as “Assessment”, with the other impugning the entire judgment. We have made a finding to the effect that the judgment is not severable, and so if one part is unsustainable in law, the entire judgment must be set aside.”***

34. It is also a far cry from the case of ***Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR*** where a matter that had been heard and determined by a court of competent jurisdiction was re-opened and retried by directing the parties to adduce further evidence by filing affidavits setting out particulars. There was obviously no jurisdiction to do so.

35. Unlike assessment or computation of damages which is a judicial function which cannot be delegated to a Registrar to perfect a judgment, the ascertainment of boundaries by those who were competent to do so was necessary in the circumstances of this case to effect the execution of the decree. The order for eviction was made in the decree and was not the consequence of the survey order as surmised by counsel. We find no impropriety in the order made by the trial court which was also part of the decree. At any rate, even if the impugned order was expunged, the decree would still remain valid and capable of execution. It would make no difference to the outcome of the appeal. For those reasons, we reject the final ground of appeal.

36. All the grounds of appeal urged before us have failed. It remains to make the order dismissing the appeal in its entirety with costs payable to the respondents.

Dated and delivered at Nakuru this 22nd day of November, 2017.

P. N. WAKI

…….

JUDGE OF APPEAL

R. N. NAMBUYE

…….

JUDGE OF APPEAL

P. O. KIAGE

…….

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR