



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**E.L.C. NO 94 OF 2014**

**FORMERLY KERUGOYA E.L.C NO 829 OF 2013**

**NJUE NGAI.....PLAINTIFF**

**VERSUS**

**EPHANTUS NJIRU NGAI.....1<sup>st</sup> DEFENDANT**

**IRENE MARIGU NGAI.....2<sup>nd</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

Mr Njue Ngai, has filed this declaratory suit because the two defendants who are his brother and sister respectively seeking the following orders:

1. The declaration that the decision/award of the Eastern Province Land Disputes Appeal Committee which divided his land and awarded parts of it to the defendants should be quashed and all set aside as the same is illegal and *ultra-vires* of the jurisdiction of the Appeals Committee.
2. An eviction order because two defendants, their families and servants.
3. A permanent injunction to restrain the defendants from re-entering upon or to use the suit land.
4. Costs of the suit.

The defendants in their joint defence have opposed the claim. They state that this is an appeal through the back door because the appellant has exhausted all the appellate provisions. According to them the matter is *res-judicata*.

That is why they raised this preliminary objection.

**The Plaintiff's Case:**

From the plaint, it is clear that the plaintiff has filed a declaratory suit in which he is seeking the vacation of the defendants and permanent injunction to ensure that they do not re-enter the suit land. The declaration is sought to declare that the Appeals Committee did not have jurisdiction to interfere with the

title to suit land which was registered in the name of the plaintiff. According to him, the Appeals Committee lacked the necessary jurisdiction to subdivide his land into two portions leaving him with 4.85 of the suit land and 2 acres to his mother who was holding trust for herself and her children including two defendants.

According to him, the matter is not *res judicata* because in Civil Appeal No. 47 of 2001 in the High Court at Embu his appeal was dismissed for want of prosecution. It was never heard on merit. The plaintiff's attempts to reinstate the appeal in the High Court were unsuccessful. His further appeal to the court of appeal was dismissed.

Finally, the plaintiff has submitted that the courts have held that a declaratory suit is an alternative to **Order 53 Judicial Review**. In support of that proposition, he has cited a High Court decision in **Ngigi v. Chomba and 3 others (2004) KLR 597** amongst other decisions. In that case, the High Court held that a declaratory suit is an alternative to Order 53 Judicial Review. The High Court cited that approval, of the Court of Appeal in Robert and **Entwistle v. Trustees of Nairobi Baptist Church, Civil Application No. 312 of 1989**.

The plaintiff has therefore urged the court to dismiss the preliminary objection and allow the hearing to proceed on merit.

### **The Defendant's Case:**

The two defendants/applicants in their joint statement of defence have stated that the plaintiff's suit is an appeal through the back door after he had exhausted all his appeal options. In all his appeal cases, the plaintiff and the defendants were parties. They have therefore stated that the matter is *res-judicata*.

Additionally, they have stated that it should be struck out on the basis of a court process. The preliminary objection is raised to dismiss the suit on the grounds that it is *res-judicata* and that it amounts to an abuse of the court process.

According to the defendants/applicants, the appellant filed an appeal in the High Court at Embu being Civil Appeal No. 47 of 2001. This appeal was dismissed on 11<sup>th</sup> February, 2005 after 4 ½ years for want of prosecution. In the year 2008, the plaintiff filed an application to have the dismissed appeal reinstated for hearing. It was similarly dismissed on the ground that there was no inordinate and inexplicable delay.

The plaintiff filed an appeal in the court of appeal being Civil Appeal No 69 of 2012. The court of appeal sitting in Nyeri dismissed the appeal on 6<sup>th</sup> November, 2013. In doing so, they confirmed the dismissal of the High Court. The Appellate Court held that there was no inordinate delay and that is why they dismissed it with costs. The defendant/respondents have pointed out that he did not seek leave to apply to the Supreme Court. Instead, he filed this declaratory suit.

### **The Applicable Law:**

The principal of *res-judicata* is provided for in **Section 7 of the Civil Procedure Act**. In terms of the provisions of that statute, for that principal to apply, the following must be established:

1. That the suit had previously been litigated upon by the same parties and a judgement was delivered therein.
2. That the same issue is revived again to be litigated upon by the same parties and involving the same subject matter.

Furthermore, once it is established that the same issue is revived in subsequent suit it which had not heard and finally determine by a court of competent jurisdiction, the matter cannot be litigated again. It is this principal which is being used by the defendant/applicants as basis for raising their preliminary objection seeking the dismissal of the suit for being an abuse of the process of the court.

### **Issues for Determination:**

In the light of the submissions of the parties, the following are the issues for determination:

1. Whether or not the principle of *res-judicata* applies to this case.
2. Who should pay for the costs of this application.

### **Evaluation of the Submissions and the Law:**

In the light of the submissions of both parties, the issues that have to be decided upon are clear. They all relate to matters of law. It is common cause that this declaratory suit has been filed to challenge the Eastern Province Appeals Committee in its appeal No. 125 of 2000.

The Appeals Committee decided to divide the suit land into two portions measuring 4.85 acres which the plaintiff was allocated to retain and the remaining 2 acres to be registered in the name of the defendants' mother as a trustee. According to the plaintiff, the declaratory suit is an alternative to **Order 53 judicial review**. That assertion is correct. However, a declaratory suit is subject to the principle of *res-judicata*.

The issue as to whether the Eastern Province Appeals Committee had jurisdiction to divide the suit land in its appellate capacity as one of law. Under the **Land Disputes Tribunal Act, No. 18 of 1990 in Section 8** of that Act, the Appeals Committee is authorized by statute to entertain appeals from its subordinate tribunals. Its authority is based on statute. And for that reason, it had jurisdiction to entertain the appeal. As to whether it decided the appeal in one way or the other, it was within its competence to do so. In terms of **Section 8 (8)**, the "decision of the Appeals Committee shall be final on any issue and any appeal shall lie therefrom to any court."

Furthermore, in terms of **Section 8 (9)**, a decision of the Appeals Committee is appealable to the High Court on a point of law only within 60 days from the date of the decision complained of. It is therefore clear that the Appeals Committee had statutory jurisdiction and competence to entertain the appeal.

Furthermore, the Appeals Committee was a court of competent jurisdiction and its decisions are binding upon the disputing parties. And as long as its decision stands, the doctrine of *res-judicata* applies. I therefore find that the principle of *res-judicata* applies to this case.

### **Verdict and Disposal Order:**

In the light of the foregoing, I make the following orders:

1. The preliminary objection of the defendants/respondents is hereby upheld.
2. The suit of the plaintiff is hereby dismissed because it is contrary to the principle of *res-judicata*.
3. I make no order as to costs of this application because the suit involves close family members.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this...**29<sup>th</sup>** .... day of **JANUARY,..2015**

In the presence of M/S Gitari for the plaintiff and Mr Andande holding brief for Mr Njeru Ithiga.

Court clerk Mr Muriithi.

Right of appeal under Order 43 Civil Procedure Rules of 2010 explained to the parties.

**J.M. BWONWONGA**

**JUDGE**