



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 170 OF 2013**

**JOHN SITUMA BIKETI.....PLAINTIFF**

**VERSUS**

**LUMBOKA ESTATE LTD.....1ST DEFENDANT**

**ELIUS KIMUNGUI CHESSES.....2ND DEFENDANT**

**COSMAS WAFULA BARASA.....3RD DEFENDANT**

**RICHARD KISEMBE MUKHWANGACHI.....4TH DEFENDANT**

**FREDRICK BOIT.....5TH DEFENDANT**

**R U L I N G**

1. The Applicants brought a Notice of Motion dated 2/5/2015 seeking dismissal of this suit on the ground that the same is res judicata. The application is based on the supporting affidavit of Christopher Wasike Majimbo the Chairman of the first applicant company. The applicants contend that the respondent herein had filed proceedings before Cherangani Land Disputes Tribunal under the provisions of the Land Disputes Tribunal Act (Now repealed) against Christopher Wasike Majimbo as an individual. The proceedings related to **L.R. No. 2143/1/5**. The tribunal verdict was adopted as judgment of the court in **Kitale Senior Principal Magistrates Court Land Case No. 26 of 2004**. It was ordered that the respondent who was the claimant in the tribunal be awarded **11.5 acres** to be curved out of **L.R. No. 2143/1/5**.

2. The defendant in the tribunal case was dissatisfied with the decision of the tribunal. He filed an application in the High Court seeking to quash the verdict of the tribunal which was subsequently adopted as judgment of court. Leave was granted to the applicant to commence judicial review proceedings. The said leave was to operate as stay of the decision of the tribunal. Before the main application for judicial review could be heard, the advocates for the parties filed a consent setting aside the proceedings of the tribunal.

3. The applicants now contend that since the case herein had been decided by the tribunal, the present case is therefore res judicata and ought to be dismissed.

4. The respondent opposed the application through grounds of opposition filed on 18/6/2015. The respondent contends that the applicants application is not merited and that the issues raised herein have not been determined by any court with competent jurisdiction. The respondent further contend that the

issues raised in this suit are completely different from the issues raised in the previous suits.

5. The principle of res judicata is predicated on Section 7 of the Civil Procedure Act which provides that no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

6. It is clear from the provisions of Section 7 of the Civil Procedure Act that a matter can only be said to be res judicata if the issues in the current suit were the same and were litigated by same parties or any of them under which they claim and finally decided. Now the issue which arises for determination in this application is whether the issues raised in the present suit were raised in the previous suit and decided by a competent court. It is not in contention that the subject of litigation in the previous suit as in this one was **L.R. No. 2143/1/5**. It is also not in contention that the deponent of the applicant's affidavit was and is the Chairman of Lumboka Estates Ltd but that in the previous proceedings, he was sued as an individual. Though he was sued as an individual,, the subject matter of the suit in the previous suit was property of Lumboka Estates Ltd.

7. It has been conceded by the applicants that the proceedings of the tribunal were set aside. If the proceedings of the tribunal were set aside, this means that the parties were taken to square one. It cannot therefore be argued that there was any decision from the tribunal which could render the current suit res judicata. It is clear that after the applicant in the High Court obtained stay of proceedings of the tribunal, the current respondents lawyer saw it fit not to fight the application and that is why a consent was filed setting aside the tribunal proceedings. There is therefore nothing left from the previous suit which will render the current one res judicata. I therefore find no merit in the applicants application. The same is hereby dismissed with costs to the respondents.

It is so ordered.

Dated, signed and delivered at Kitale on this **29th** day of **July, 2015**.

**E. OBAGA**

**JUDGE**

**29/7/2015**

**In the presence of M/s Bett for Defendant and M/s Arunga for the Plaintiff.**

**Court Assistant – Winnie.**

**E. OBAGA**

**JUDGE**

**29/7/2015**

**In the presence of M/s Bett for Defendant and M/s Arunga for the Plaintiff.**

**Court Clerk – Winnie.**

**E. OBAGA**

**JUDGE**

**29/7/2015**