



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CIVIL CASE NO. 234 OF 2011**

**SUSAN NYAMOKAMI MARIGA .....PLAINTIFF**

**VERSUS**

**FRANCIS NYAATA MAROCHA .....DEFENDANT**

**RULING**

1. The plaintiff brought this suit against the defendant on 25<sup>th</sup> October 2011 seeking:

- a. **A declaration that the decision of Suneka Land Disputes Tribunal was ultra vires and res judicata.**
- b. **A declaration that sub-division of LR No. Wanjare/Bogiakumu/ 1790 (“Plot No. 1790”) into Wanjare/Bogiakumu/4857 and 4133 (“Plot Nos. 4857” and “Plot No. 4133”) without obtaining letters of administration was unlawful and fraudulent.**
- c. **A permanent injunction restraining the defendant by himself or by his agents, servants and/or any other person acting under the instructions of the defendant from implementing the decision of Suneka Land Disputes Tribunal on LR No. Wanjare/ Bogiakumu/1791 (“Plot No. 1791”).**
- d. **Cost of the suit and interest thereon.**

In her plaint dated 25<sup>th</sup> October 2011, the plaintiff averred that she was at all material times the registered proprietor of Plot No. 1791. The plaintiff averred that Plot No. 1791 is a sub-division of LR Wanjare/Bogiakumu/687 (“Plot No. 687”) and that upon sub-division, Plot No. 687 gave rise to Plot No. 1790 and Plot No. 1791 which, were registered in the names of one, Marucha Manyura, deceased and the plaintiff respectively.

2. The plaintiff averred that the defendant caused Plot No. 1790 to be subdivided fraudulently into two portions namely, Plot NO. 4857 and 4133 without obtaining grant of letters of administration of the estate of Marucha Manyura, deceased. The plaintiff averred that the defendant thereafter lodged a complaint with the Land Registrar Kisii Central against the plaintiff contending that the plaintiff had encroached on Plot Nos. 4857 and 4133. The defendant sought the assistance of the said Land Registrar to fix the boundaries of Plot Nos. 1791, 4857 and 4133. The plaintiff averred that before the Land Registrar could determine the said boundary dispute the defendant lodged another complaint against the plaintiff with Suneka Land Disputes Tribunal (“the Tribunal”) on the issue of the boundaries of Plot Nos. 1791, 4857 and 4133. The plaintiff contended that the Land Registrar made its decision on the boundary dispute on 31<sup>st</sup> March 2010 while the Tribunal made its decision on 27<sup>th</sup> April 2010 which decision was adopted as a judgment of the court on 24<sup>th</sup> November 2010.

3. The plaintiff averred that the boundary dispute between the plaintiff and the defendant having been

determined by the Land Registrar, the same was *res-judicata* and as such was not open to the Tribunal to determine. The plaintiff averred further that the decision of the Tribunal was *ultra vires* its powers. The plaintiff averred further that the implementation of the Tribunal's decision will result in her eviction from Plot No. 1791 thereby occasioning her loss and damage. It is on account of the foregoing that the plaintiff brought this suit. Together with the plaint the plaintiff brought an application by way of Notice of Motion dated 25<sup>th</sup> October 2011 seeking a temporary injunction to restrain the defendant from implementing the Tribunal's decision aforesaid. The plaintiff's application was supported by the affidavit sworn by the plaintiff in which the plaintiff reiterated the contents of the plaint which, I have highlighted hereinabove in detail.

4. The plaintiff's application for temporary injunction was opposed by the defendant through a replying affidavit sworn on 13<sup>th</sup> December, 2011. In his affidavit, the defendant contested the alleged decision of the Land Registrar on the boundary dispute that the plaintiff had with the defendant and contended that the same was fraudulent. The defendant contended further that the decision of the Tribunal had been adopted as a judgment of the court and the plaintiff who was aggrieved with the same lodged a judicial review application seeking the quashing thereof and an order inhibiting the implementation of the same. This was in Kisii High Court judicial review application No. 76 of 2010, **Republic –vs- Suneka Division Land Disputes Tribunal & 2 Others ex parte Susan Nyamokami Mariga** (hereinafter referred to only as "the judicial review application"). The defendant contended that the plaintiff's application for judicial review was dismissed by Makhandia J. (as he then was) on 29<sup>th</sup> July 2011. In dismissing the said application, Makhandia J. found that the tribunal was within its powers when it entertained the defendant's complaint against the plaintiff and reached the decision that was contested by the plaintiff. The court declined to strike out the Tribunal's decision and also to prohibit the implementation thereof.

5. The defendant contended that the ruling in the judicial review application was not appealed by the plaintiff and as such the same remains unchallenged. The defendant contended that it is not open to the plaintiff to mount these proceedings which in effect seeks to overturn the ruling that was made in the judicial review application. The defendant contended that in this suit the plaintiff is trying to re-litigate the issues that had been raised and determined in Kisii Misc. Civil Application No. 64 of 2010 in which the Tribunal's decision was adopted as a judgment of the court and in the judicial review application in which the Tribunal's decision was challenged by the plaintiff. The defendant accused the plaintiff of concealing the existence of the judicial review application and the ruling made herein. The defendant contended that the issues regarding the legality of the defendant's titles over Plot No. 4857 and 4133 should have been raised by the plaintiff before the Tribunal and before this court in his application for judicial review.

6. The plaintiff's application for temporary injunction was heard by R. Lagat-Korir J. who allowed the same as prayed on 20<sup>th</sup> September 2012. In her ruling Lagat Korir J. found that the plaintiff has an arguable case against the defendant and that he had established a *prima facie* case with a probability of success against the defendant. The judge stated as follows in her ruling:

**“The main suit is still pending hearing and determination. No doubt it is arguable since an existing registered title is adversely affected. The issue of jurisdiction has been raised. This is, indeed a substantial issue in this suit. In view of all these concerns, it is only just that the title be preserved intact to abdicate unnecessary expense which may result if the title is altered ..... I am satisfied that the applicant has shown a *prima facie* case with a probability of success.”**

There is no indication from the record that the ruling by R. Lagat Korir J. was challenged on appeal. The same therefore remains valid and binding upon the parties. While the plaintiff's application for injunction was pending hearing and determination, the defendant lodged an application by way of Notice of Motion dated 13<sup>th</sup> December 2011 seeking an order that the plaintiff's suit be struck out with costs. The defendant's application was brought under sections 1A, 1B, 3, 3A, 7 and 63 (e) of the Civil Procedure Act, Cap 21 Laws of Kenya.

7. The defendant's application was brought on the ground that the issues raised in this suit are *res judicata* the same having been in issue and/or substantially in issue in Suneka Land Disputes Tribunal Case No. 45 of 2010, Kisii CMCC Misc. Civil Application No. 64 of 2010 and Kisii High Court Misc. Civil Application No. 76 of 2010. The defendant's application was supported by the affidavit of the defendant sworn on 13<sup>th</sup> December 2011 in which the defendant reiterated the contents of the affidavit that the defendant had sworn in reply to the plaintiff's application for injunction, the contents of which I have highlighted above. The defendant reiterated that he lodged a complaint against the plaintiff at the Tribunal. The Tribunal made a decision in his favour. The decision of the Tribunal was adopted as a judgment of the court. The plaintiff was aggrieved with the decision of the Tribunal and its adoption as a judgment of the court and challenged the same by way of judicial review application.

8. The plaintiff's application for judicial review of the Tribunal's decision was dismissed on 29<sup>th</sup> July 2011. The defendant's contention is that the plaintiff's attempt to review the decision of the Tribunal having been dismissed by the court, the plaintiff cannot lawfully mount another challenge against the said decision while the court's decision in the judicial review application remains unchallenged. The defendant's application was opposed by the plaintiff through a replying affidavit sworn on 26<sup>th</sup> June 2013. In her affidavit the plaintiff reiterated that the defendant caused Plot No. 1790 to be sub-divided fraudulently into two portions without first obtaining grant of letters of administration in respect of the estate of Marocha Manyura deceased who was the registered owner thereof. The plaintiff contended that he had no dispute with Marocha Manyura deceased during his lifetime over the boundary of Plot No. 1790 and Plot No. 1791. The plaintiff reiterated that the defendant lodged a complaint with the District Land Surveyor Kisii over the disputed boundary before he moved to the Tribunal. The plaintiff contended that the court had already held that her claim against the defendant has merit. The court cannot therefore be called upon to strike out this suit without a hearing on merit.

9. On 20<sup>th</sup> June 2013, the advocates for the parties agreed to argue the defendant's application by way of written submissions. Both parties filed their submissions and the same are on record. I have considered the defendant's application together with the affidavit filed in support thereof. I have also considered the plaintiff's affidavit in reply to the application and the parties' respective submissions. The defendant's application has been brought primarily under section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya. The other provisions of the Civil Procedure Act cited by the defendant are merely supportive in nature. The defendant has sought to strike out the plaintiff's suit on the ground that the same is *res judicata*. Section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya provides as follows:-

**“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.”**

10. The defendant has contended that the issues raised in this suit for determination by the court had been raised and determined in the following cases:

- i. Suneka Land Disputes Tribunal Case No. 45 of 2010 (“the Tribunal case”).**
- ii. Kisii CM Misc. Civil Application No. 64 of 2010 (“the adoption case”).**
- iii. Kisii HC Misc. Civil Application No. 76 of 2010 (“the judicial review”).**

I have at the beginning of this ruling set out the nature of the plaintiff's case against the defendant and the reliefs sought. What I need to determine in the application before me is whether the issues raised in this suit had been raised, heard and finally determined in the suits that I have mentioned above. The plaintiff's claim in this suit is that the defendant caused Plot No. 1790 which was registered in the name of his deceased father, Marocha Manyura, deceased to be subdivided without first obtaining grant of letters of administration and thereafter lodged a complaint against the plaintiff first with the District Land Registrar, Kisii Central and thereafter with the Tribunal concerning the boundaries of Plot Nos. 4857 and

4133 (sub-divisions of Plot No. 1790) and the plaintiff's parcel of land namely, Plot No. 1791. The plaintiff has contended that before the District Land Registrar made its determination on the defendant's complaint the defendant moved to the Tribunal.

11. The plaintiff's contention in this suit is that the defendant's complaint to the Tribunal was *res judicata* and that the Tribunal had no power to determine the defendant's complaint. The plaintiff's *res judicata* argument is raised on the ground that as at the time of the Tribunal's decision the District Land Registrar had already determined the dispute that existed between the plaintiff and the defendant over the boundaries of Plot Nos. 4857 and 4133 on one hand and Plot No. 1790 on the other hand. On his *ultra vires* argument, the plaintiff contended that the Tribunal had no jurisdiction to determine an issue that was *res judicata*. In the Tribunal's case, the issue that was raised and determined was whether the boundaries of Plot No. 4857, 4133 and 1791 had been tampered with and whether the plaintiff had trespassed or encroached on the Plot No. 4857 and 4133.

12. The issue that was up for determination in the adoption case was whether the Tribunal's decision could be adopted as a judgment of the court or not. In the judicial review application the issue was whether the Tribunal acted within its powers when it entertained the defendant's complaint and made the decision that was challenged in the said application. The others issues were, whether the Tribunal's decision was liable to be quashed and its implementation prohibited. From what I have set out hereinabove, it is clear that the only issues that can be said to have been raised and determined in the earlier cases between the parties herein are whether the decision of the Tribunal was *ultra vires* and whether the implementation of the said decision could be restrained. These issues were raised in the judicial review application, were heard and finally decided by the court. The only recourse that was available to whoever was dissatisfied with the decision of the court on these issues was to appeal to the Court of Appeal. These issues are *res judicata* and as such the court cannot be called upon to consider the same again. The other issue raised in the plaintiff's suit herein such as whether the defendant caused Plot No. 1790 to be sub-divided fraudulently was not raised in the earlier cases and as such the same is not *res judicata*.

13. I am not in agreement with the defendant's advocate's submission that this is an issue which the plaintiff should have raised in the earlier cases. With all due respect this issue could not have been determined in the Tribunal's case, the adoption case and in the judicial review application. Neither the Tribunal nor the courts that determined the cases above had jurisdiction to determine the issue. It is my finding that this issue is not *res judicata*. The defendant's application herein as I have stated above was restricted to section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya. It was not brought under Order 2 rule 15 of the Civil Procedure Rules. Under order 2 rule 15, I would have considered whether the plaintiff can competently challenge the sub-division of Plot No. 1790. That avenue is not open to me in the present application. The issue will have to be determined at the trial.

14. The upshot of the foregoing is that the defendant's application succeeds in part. Prayers (a) and (c) in the plaint dated 25<sup>th</sup> October 2011 are hereby struck out. The defendant's costs in relation to the reliefs in the plaint that have been struck out shall abide the determination of the other reliefs sought in the plaint or further orders by the court. The defendant shall have the costs of this application.

**Delivered, signed and dated at KISII this 31<sup>st</sup> of October, 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Miss Ngogi h/b for Nyambati for the plaintiff

Mr. Oguttu h/b for Nyamurongi for the defendant

Mr. Mobisa Court Clerk

**S. OKONG'O**

**JUDGE**