



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
LAND AND ENVIRONMENT COURT
CIVIL CASE NO.51 OF 2011

MUCHEMI MUTUNE.....PLAINTIFF

VERSUS

BENARD KIMATHI GITONGA.....1ST DEFENDANT

JOYCE WANJIRA NDUHIU.....2ND DEFENDANT

RULING

On the 16th of May 2011, the plaintiff herein Muchemi Mutune, sued the defendants for cancellation of registration of land **No.L.R.THEGENGE/KIHORA/761 & 762** and the same to revert to its prior position as **LR.THEGENGE/KIHORA/128** in the names of the plaintiff and the 2nd defendant as joint owners.

The plaintiff also prays for a declaration that the L.D.T had no jurisdiction to entertain a matter touching on issues of title deed.

The plaintiff claims that Land Parcel **No.L.R.Thegenge/Kihora/128** was registered jointly in the name of the plaintiff and the 2nd defendant and that the 1st defendant was his tenant on his portion at an annual rental fee of Kshs.1000.

The plaintiff alleges that sometimes in the year 2010, the 1st defendant started preparing a building site in the plaintiffs portion of land and upon rental demands that he stops, he retorted that the said portion was registered in his name being land reference No.Thegenge/Kihora/761.

The plaintiff claims that the registration of the land in the 1st defendant's name was fraudulent and that he has occupied the land since 1958.

There has been a suit between the plaintiff and the 1st defendant vide Land Dispute Tribunal at Tetu being case No.LDT.3/2010 which has been determined by the LDT, however, separate appeals have been filed by the parties in the Central Province Land Appeals Committee.

The 1st defendant in his defence dated and filed on 10/6/2011 states that pursuant to the Nyeri Chief Magistrate's case No.101 of 2000, LR.Thegenge/Kihora/128 was partitioned into two equal shares LR.Thegenge/Kihora/761 which was registered in the names of the plaintiff and LR.Thegenge/Kihora/762 which was registered in the name of the 2nd defendant on 24/1/2001.

The defendant states that prior to the subdivision, the 1st defendant was occupying and utilizing the

plaintiff's portion with the plaintiff's consent not as a tenant but out of love and taking care of the plaintiff's welfare.

It is the 1st defendant's contention that the plaintiff transferred the parcel of land to the defendant as a gift, where upon consent to transfer was given and the transfer was executed and the 1st defendant was registered as proprietor of L.R.Thegenge/Kihora/761 and denies any wrong doing in terms of fraud or otherwise but reiterates his right to construct on the parcel of land and eviction of the plaintiff.

The second defendant on his part avers that the parcel of land L.R.Thegenge/Kihora/128 was subdivided pursuant to a court order in Nyeri C.M. Award No.101 of 2000 in proceedings commenced by the plaintiff against the 2nd defendant. He denies having committed any fraud and avers that the suit herein is res judicata.

In his reply to defences filed by the defendants the plaintiff states that the suit is competent and prays that the defences of the defendants be struck out for being mere denials.

On the 6/5/2013, the defendant took a Notice of Motion under section 7 and 1A of the Civil Procedure Act Cap 21 Laws of Kenya for a preliminary objection that the suit herein is res judicata and an abuse of the court process as the suit land was the matter directly and substantially in issue in Nyeri C.M Award No.101 of 2000. The application was supported by the affidavit of Mwangi Kiminda. The defendant also filed submissions to the effect that the suit was res judicata.

The plaintiff filed his submissions on 30/5/2013. The plaintiff submitted that the proceedings of the L.D.T were bare of jurisdiction as they were in breach of section 3 of the L.D.T Act No.18 of 1990.

Though am not bound, but I'm guided, by the decision of **Kuloba J in Kibundi -VS- Mukobwa and another 1993 KLR at page 777** when he stated that the condition of applying the doctrine of res judicata was

- 1) **Identity of the matter in issue**
- 2) **Identity of the parties**
- 3) **sameness of title**
- 4) **concurrence of jurisdiction**
- 5) **finality of the previous decision.**

The matter in issue in this suit is fraud and lack of jurisdiction by the Land Disputes Tribunal and whether their decision was illegal and nullity whilst the issue before the tribunal was whether Bernard Kimathi Gitonga had acquired the land in dispute by surporting Muchemi Mutune financially and in kind or was merely renting the latter's land.

On the issue of identity of parties, the 2nd defendant was not party to the proceedings of the Land Disputes Tribunal and the decision thereof and therefor the application fails on this point. In ***Kibundi -VS- Mukobwa supra Kuloba J*** as he then was held

“Given the fact that sometimes different people may bear the same or similar names or names with very small or insignificant differences, one requires positive evidence to show that the respondents in the former suit are the same as respondents in the instant suit. A positive identity must be shown on a claim that a suit is barred by doctrine of res judicata”.

On the issue of ***sameness of title*** I do find in favour of the applicant due the fact that title No.128 was subdivided on the basis of the decision of the LDT and Chief Magistrate's Court to produce title No.761

and 762.

On ***concurrence of jurisdiction***, this aspects are missing as the jurisdiction of the Land Disputes Tribunal and the Chief Magistrate Court in the matter that was before the two is not concurrent to the jurisdiction of the High Court in the matter herein as the plaintiff is questioning the jurisdiction of the Land Disputes Tribunal.

On the issue of ***finality of the previous decision***, I do find that the decision of the Land Disputes Tribunal and Chief Magistrates Court final.

The upshot of the above is that the Preliminary Objection cannot be sustained as it does not have all aspects of ***res judicata***. I accordingly reject the objection and allow the plaintiff to present his case for hearing on the merits of the case and for each party to give evidence upon which the case shall be decided and disposed of. The parties may take hearing dates. Orders accordingly.

Dated, signed and delivered at Nyeri this 28th day of June 2013.

A. OMBWAYO

JUDGE