



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 46 OF 2011**

**CHARLES GORDON INDIWA ..... PLAINTIFF**

**VERSUS**

**NORAH CHEBET NDIWA ..... 1ST DEFENDANT**

**TECLA CHEPANGOR NDIWA..... 2ND DEFENDANT**

**THE CHAIRMAN MT. ELGON LDT ..... 3RD DEFENDANT**

**RULING**

The 1st and 2nd defendants raised a preliminary point of law that the plaintiff's suit is *res judicata*.

As per Mr. Juma for the 1st and 2nd defendants, the dispute before court is in respect of **L.R. NO. Elgon/Chemonge/297**. This was arbitrated by Mt. Elgon Land Disputes Tribunal and its finding adopted as order of court in Kimilili PMCC NO. 17 of 2009.

According to counsel, the plaintiff admits participating in the proceedings before the Tribunal at paragraph 6 of his plaint. The present suit regards same subject matter and same parties. That this suit is asking the court to sit on appeal. He urged the suit to be struck out for being *res judicata*.

The plaintiff opposed the preliminary point. His arguments is that he was not informed when the award was read. He urged the court to dismiss the preliminary objection as the Tribunal lacked capacity to arbitrate the dispute. These are the prayers contained in the plaint;

***“(a). Declaratory order that the purported proceedings and deliberations, verdict and award of plaintiff's portion of land vide parcel No. L.R. NO. Elgon/Chemonge/297 to the 1st defendant are null and void.”***

***“(b). Permanent injunction to restrain the defendants, their agents and/or servants from interfering with the plaintiff's land.”***

Essentially the plaintiff is questioning the verdict of the Tribunal. Although the subject matter is the same, the issues raised is not what is envisaged under Section 7 of the Civil Procedure Act. The Tribunal cannot question it's own decision nor issue injunctive orders, temporary or otherwise while adjudicating a subject matter. The tribunal cannot grant the prayers currently sought in the plaint.

The defendants can challenge the suit on its merit but *res judicata* is not open avenue in this case. It's the court's finding that the preliminary objection is therefore unmerited and is disallowed with costs to the plaintiff.

**RULING DATED, SIGNED, READ and DELIVERED** in open court this 26th day of June 2013

**A. OMOLLO**

**JUDGE.**