

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL CASE NO. 101 OF 2006

BERNARD MUGO NDEGWA.....PLAINTIFF

VERSUS

JAMES NDERITU GITHAE.....1ST DEFENDANT

JOHN GIKANDI MAGONDU.....2ND DEFENDANT

JACKSON WACHIRA WAMAI.....3RD DEFENDANT

RULING

Counsel for the 2nd defendant herein had given notice vide the statement of defence of the 2nd defendant to the effect that he would be raising a Preliminary Objection on the issue of “*Res Judicata*.” He did so and this is the short ruling to that Preliminary Objection. Unfortunately, the issue at hand is not as straight forward as it might seem to the counsel.

First and foremost, it is a rule of evidence that whoever alleges the existence of a fact must prove it. In this case, it is incumbent upon for the 2nd defendant to establish that the matter is res-judicata. I have said often that the party, raising the issue of Res Judicata must present to the court the proceedings and/or Judgment of the previous suit so that the court can confirm for itself that the issues being raised in the present suit were the same ones which had been raised and determined in the previous suit. It is not enough to say that such a suit existed. The existence of such a suit per se without evidence of what the issues were and whether they were determined or not does not suffice to have a court make an informed ruling on the issue of res judicata. In this case, the plaintiff has conceded that there was such a case which was before the Land Disputes Tribunal but which was dismissed. We do not know what the claim was, and the reasons for its dismissal. The plaintiff herein is a layman appearing in person and he was not in a position to contribute ably to this objection. Under Section 7 of the Civil Procedure Act, a suit will be Res Judicata if;

“the matter directly and substantially in issue has been directly and substantially in issue in a former suit, between the same parties under whom they or any of them claim, litigating under the same title, in a court competent (emphasis mine) 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.”

For the purposes of this preliminary objection, I will assume that the parties were the same in the Land Disputes Tribunal as in this court.

The second important point is “*what were the issues before the Tribunal?*” This court has not been informed by such issues and this could only have been done if the proceedings /award of the Tribunal was availed to court. I cannot therefore confidently say that the issues raised there are the same issues which have been raised in this suit.

Thirdly, and of most important is the issue of “*a court competent to try such subsequent suit.*” Was the Land Disputes Tribunal competent to try any of the issues raised in this suit? The plaintiff’s cause of

action herein is based on “*specific performance*” of a contract. The Land Disputes Tribunal is not scised of jurisdiction or competence to decide on matters based on specific performance. This plaint also raises the issue of fraud which particulars the plaintiff has particularized. Was this an issue that the Land Disputes Tribunal was competent to try? I find not. In my considered view we cannot say that the issues of fraud or specific performance were either raised and determined or ought to have been raised and determined before the Land Disputes Tribunal in order to make this suit Res Judicata. Briefly put, the Land Disputes Tribunal was not a competent court as envisaged in Section 7 of the Civil Procedure Act. This suit is therefore not Res Judicata and the same is properly before this court and it should proceed to hearing. The Preliminary Objection is therefore overruled. Parties to nonetheless do discovery and file their lists of documents in court before they take a hearing date.

W.

KARANJA

JUDGE

Delivered, signed and dated at Embu this 15th day of Feb 2010.

In presence of: Mr. Kamuga for Mr. Kiama for 2nd Defendant.