



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**OF KISII**  
**Civil Suit 27 of 2009**

**OMBUI ONYANGO ..... APPLICANT/PLAINTIFF**

**VERSUS**

**KUNGA MORUMBASI ..... RESPONDENT/DEFENDANT**

**RULING**

The plaintiff filed an application seeking an order of interlocutory injunction to restrain the defendant from interfering with his parcel of land known as SOUTH MUGIRANGO/BOIKANGA/618, hereinafter referred to as “**the suit land.**” He annexed to his affidavit in support of the application a copy of the land certificate which shows that the suit land was registered in his name on 27<sup>th</sup> February, 1979. It is a first registration under the Registered Land Act. In the main suit the plaintiff is seeking, *inter alia*, an eviction order against the defendant from the suit land.

The defendant filed a preliminary objection against the plaintiff’s suit, saying that the suit is *res judicata* and that the copy of the land certificate annexed to the plaintiff’s affidavit is defective.

When the said application came up for hearing, Mr. Sagwe for the defendant argued that the dispute over the suit land had earlier been referred to the Nyamarambe Land Disputes Tribunal which heard the dispute and gave its decision on 22<sup>nd</sup> February, 2006.

The said Tribunal found that the defendant herein had interfered with the boundaries of three parcels of land which are South Mugirango/Boikanga/617, 619 and 624. He had done so by encroaching into a road reserve. The Tribunal was of the view that the area Land Registrar should reinstate the road reserve as it previously existed.

When the Tribunal’s award was filed before the Chief Magistrate’s court for adoption as a judgment of the court, Wewa, RM, heard submissions from both parties and dismissed the suit as being time barred.

The defendant annexed to his relying affidavit copies of  
the Tribunal proceedings as well as the decree issued by the Chief Magistrate’s court.

Mr. Onyancha for the plaintiff opposed the preliminary objection. He said that the plaintiff was not a party to the suit that was before the Land Disputes Tribunal but the defendant was. He further submitted that the suit land was not a subject of the dispute before the Tribunal. The present suit is therefore not *res judicata*, *he stated*.

In reply, Mr. Sagwe said that the issue of the suit land was raised by one Onyango Nyandoro, a brother of the plaintiff, who claimed that he was the owner of the same.

This preliminary objection can be resolved by interpreting the provisions of **section 7** of the **Civil Procedure Act** which states 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.”**

The parties to the dispute that was before the Tribunal were Mokomo Motania, Nyandoro Onyango and Sikia Onyiego as the claimants and Kunga Morumbasi, Akuma Momanyi and Ombati Oire as the objectors. The plaintiff was therefore not a party to the said dispute. There was however some reference made to the plaintiff in the course of the proceedings where it was stated – **“Ombui Onyango claims Kunga Morumbasi and Ombati Oire have invaded his land.”** But it cannot be said with any certainty that the land referred to was the suit land because Nyandoro Onyango had alleged that the suit land belonged to him. It appears to me that the issue for determination was not ownership of the suit land.

At the time when the matter was before the Tribunal, the suit land had a title deed. The same was in the name of the plaintiff. The Tribunal did not therefore have jurisdiction to determine any issue regarding ownership of the same. Its jurisdiction is as defined by the provisions of **section 3 (I) of the Land Disputes Tribunals Act, 1990.**

In the premises, it cannot be said that this suit is *res judicata*. I dismiss the preliminary objection with costs to the plaintiff.

**DATED, SIGNED AND DELIVERED AT KISII THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2009.**

**D. MUSINGA**

**JUDGE.**

**19/11/2009**

Before D. Musinga, J.

Mobisa – cc

Mr. Ongige HB for Mr. Sagwe for the Defendant

Mr. Kaburi HB for Mr. Koina for the Plaintiff

**Order:** Ruling delivered in chambers.

**D. MUSINGA**

**JUDGE.**