REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Civil Suit 232 of 2001

STEPHEN WAWERU……...PLAINTIFF

VERSUS

THE COMMITTEE

NYANDUNDO PRIMARY SCHOOL…..…..1ST DEFENDANT

DIRECTOR OF SETTLEMENT…..……..2ND DEFENDANT

RULING

The defendant has raised a preliminary objection seeking to have this suit struck out on the ground that the matter is res judicata. The objection is based on the ground that the plaintiff had earlier on filed Nakuru HCC No. 391 of 1994 against the same defendants but the Court of Appeal in Civil Appeal No. 179 of 1999 dismissed his claim with no order as to costs.

Mr. Kimatta for the plaintiff urged me to overrule the preliminary objections as ill conceived because his client's case was dismissed on a technicality and the matter was therefore not decided on merit.

The history of this matter is briefly this. The plaintiff filed a suit in the Resident Magistrate's court at Nakuru complaining that his pieces of land had been allocated by the 2nd defendant to the 1st defendant. After the plaintiff's case had been fully heard his advocate realized that the Resident Magistrate's court did not have jurisdiction. He managed to convince the defendant and had the suit transferred to the High Court by consent. In the High Court the parties consented to having the hearing continue from where the Resident Magistrate had left it. After hearing the case the High Court granted the plaintiff the declaration

he sought thus provoking Civil Appeal No. 179 of 1999 to the Court of Appeal in which, as I have said, the Plaintiff's claim was dismissed with no order as to costs.

Section 7 of the **Civil Procedure Act** is very clear as to when a matter is res judicata. It reads:-

"**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 a subsequent suit or the suit in which such a issue as been subsequently raised, and has been heard and finally decided by such a court."**

It is clear from this provision that for the matter to be res judicata the court trying the former suit must have been a court competent to try it.

I have read the judgment of the Court of Appeal in the said appeal. The appeal was allowed and the plaintiff's claim was dismissed on the ground that part of the case was heard before the Resident Magistrate who by virtue of **Section 159** of the **Registered Land Act Cap 300** of the **Laws of Kenya** did not have jurisdiction to hear it. It therefore follows that the former suit was not heard by a court of competent jurisdiction. Besides this the matter was not decided on merit. A matter is res judicata when the former suit was heard and decided on merit – **Kibogy Vs Chemweno [1981] KLR 35 and Wangulu Vs Kania [1987] KLR 51**. Consequently I find that the matter is not res judicata and I accordingly overrule the preliminary objection. The suit shall be set down for hearing and decided on merit.

DATED and delivered this 18th day of November, 2009.

D. K .MARAGA

JUDGE.