

2. I have deliberately set out the above issues because save for the descriptive parts of the Plaintiff and the fact that the Defendant instituted the proceedings before the Land Tribunal, no other issue is raised regarding the Defendant. I will return to the issue shortly but the orders sought in the Plaintiff are;

“(a) A declaration that the Land Disputes Tribunal had no jurisdiction and therefore the proceedings before it and the award made thereby, as well as the order or the court adopting the award as the judgment of the court are null and void, and are, hereby quashed and/or aside.

(b) A declaration that the defendant do pay to the Plaintiff costs of this suit, as well as costs before the tribunal and the Principal Magistrate’s Court, as well as those in High Court Miscellaneous Application Number 55 of 2001.

3. I note that in his evidence, the Plaintiff produced the following documents;

i. Letter of authority to sue issued by the Land Adjudication Officer –P. exhibit 1

ii. Letter dated 22.2.1998 showing that the disputed land was within an Adjudication Section –P. exhibit 2

iii. Land Adjudication Case No. 10/1981-proceedings and award – exhibit 3

iv. Certified copy of the map for the area - P. exhibit 4.

v. Proceedings and award of Kyuluni Land Disputes Tribunal - P. exhibit 5

vi. Ruling in H.C. Misc Application 55/2001 – P. Exhibit 6 and 7.

4. From what is pleaded in the Plaintiff and in proceedings before me, I can quickly discern two issues of law that I must dispose of. Firstly, is there a cause of action against the Defendant and secondly, are the matters now before me res-judicata in view of previous proceedings before the Land Disputes Tribunal? I ask these questions because although the Defendant failed to heed to the summons to enter appearance, nonetheless justice must be in accordance with law and a party before the seat of Justice must bow to the dictates of that law even if that party is appearing ex-parte.

5. On the cause of action, certain declarations are sought, principally that the decision of the Land Disputes Tribunal was made without jurisdiction. The Tribunal itself was never made a party to the suit and I have elsewhere above reproduced the paragraphs in the Plaintiff that show the Plaintiff’s complaint. In none of those paragraphs has there been any mention of any omission or commission on the part of the Defendant save that he was a party to the proceedings before the Tribunal. What then is the cause of action against him?

6. On the Cause of Action in **Black’s Law Dictionary, 16th ed.** the following passage can be found;

“What is a cause of action? Jurists have found it difficult to give a proper definition. It may be defined generally to be a situation or state of facts that entitles a party to maintain an action in a judicial tribunal. This state of facts may be – (a) a primary right of the plaintiff actually violated by the defendant; or (b) the threatened violation of such right, which violation the Plaintiff is entitled to restrain or prevent, as in case of actions or suits for injunction; or (c) it may be that there are doubts as to some duty or right, or the right beclouded by some apparent adverse right or claim, which the Plaintiff is entitled to have cleared up, that he may safely perform his duty, or enjoy his property.”
[Edwin E. Bryant, The Law of Pleading under the Codes of Civil procedure 170 (2nd ed. 1899).

7. From the above statements, it is clear to me that whatever claim the Plaintiff has and whatever merits in it, the proper party to be sued ought to have been the Land Disputes Tribunal or at least the Defendant together with the Tribunal. There is nothing in the Plaintiff nor in the evidence where one can truly discern a cause of action that can be determined as between the Plaintiff and the Defendant. *Hancox*

J. expressed himself thus when faced with a similar situation;

“ If every dispute, every injustice, real or imagined, in short every petty squabble which a person has with another, were to be justifiable by the courts, not only would the courts be forever dealing with minutiae for which there exists perfectly adequate disciplinary and other regulating machinery, but the efficient and smooth working for those bodies would become hopelessly impaired. There are always cranks and trouble makers in every organization who will go to any lengths to satisfy their mania. The courts are not for such matters. There have been recognized causes of action within which a litigant must bring himself to seek the redress of the wrong of which he complains and it is necessary that this should be so. Neither will the courts permit matters to be brought before them where there is no real or recognized cause of action or justifiable dispute. Hanxox, J (as he then was) in Asa Karanja Solomon v Presbyterian Church of East Africa and 4 Others ,High Court of Kenya at Nairobi, Civil Suit Number 2859 of 1977.

I wholly agree with his Lordship and I adopt his sentiments.

8. Another facet to the first question and as a corollary to the above issue is the fact that although the whole claim is premised on certain acts of the Kyuluni Land Disputes Tribunal, without it being a party and without it being heard, the two declarations sought against it cannot be granted. *Madan, J.* had this to say on that point-

“It is contrary to natural justice to make an adverse order against a person without first giving him an opportunity to speak in his defence. This has been said on countless occasions (Madan,J in the Matter of Application for Orders of Certiorari and Prohibition and in the Matter of Mununga Ngochi v Timetheo Makenge and JH Angaine, Minister of Lands and Settlement, High Court of Kenya at Nairobi, Miscellaneous Case Number 142 of 1976[17 November 1977])

9. It follows therefore that on the first question, no cause of action is properly established and the suit will be struck off.

10. Even if I am wrong on the above finding, I am certain that the suit herein is res judicata. *Wambuzi J.A in Timotheo Makenge vs Manunga Ngochi, C.A 25/1978 (U.R)* stated that the essence of the principle of res judicata is that litigation must come to an end. It is admitted that the Plaintiff lost his case before the Land Disputes Tribunal, a competent quasi- judicial body with e-express statutory functions. No appeal was preferred to the Provincial Appeals Committee under section 8 of that Act and no final Appeal to this court was instituted. The decision of the Tribunal can only be challenged by that process or by judicial review. It is admitted that H.C. Misc App. No. 55/2001 was filed and the Plaintiff sought to quash the decision of the Tribunal. *Nambuye,J* struck it out and to my mind that was the end of the road for the Plaintiff. He cannot now re-litigate those matters, whatever his grievances against those other decisions. It is fair and just that litigation must end even with dissatisfied parties in place.

11. In the end, I see no reason to say anything more and will quickly strike out the suit with no order as to costs.

12. Orders accordingly.

Dated and delivered at Machakos this 9th day of December 2008.

Isaac Lenaola

Judge

In the Presence of: Mr. Musyoki for plaintiff.

Isaac Lenaola

Judge