



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE 111 OF 2007

KANYINKE OLE SABERA.....1ST PLAINTIFF

STEPHEN NTOKOIWUAN KOIKAI.....2ND PLAINTIFF

VERSUS

RAPHAEL LEKISHON KOIKAI.....DEFENDANT

RULING

The plaintiff in this suit filed a suit seeking several orders of this court against the defendant regarding the ownership of parcel No. *CIS-MARA/LOLUNGA/3492* (*hereinafter referred to as the suit land*). The plaintiffs claimed that the defendant had, *inter alia*, used fraud, misrepresentation and illegal action to obtain the registration of the said parcel of land in his (*the defendant's*) name. The plaintiffs therefore prayed for an order of this court to cancel the title in respect of the suit land issued to the defendant. They further prayed for an order of this court to have the said suit land registered in the name of the 2nd plaintiff. Contemporaneous with filing the suit, the plaintiffs made an application for injunction seeking to restrain the defendant from dealing with the suit land pending the hearing and determination of the suit. The defendant was served with the application for injunction. He duly entered appearance and filed a replying affidavit to the said application. He also filed a notice of preliminary objection to the entire suit.

The said preliminary objection raised two objections to the suit: the defendant contended that the suit was *res judicata* since the matters that were directly and substantially in issue had been heard and determined by a court of competent jurisdiction; the defendant further contended that this court lacked original jurisdiction to hear and determine the matters in dispute; the defendant finally contends that the plaintiff's suit was frivolous, vexatious and an abuse of the court process.

At hearing of the preliminary objection, I heard the submission made by Mr. Aboge on behalf of the defendant. He submitted that the suit herein was *res judicata*. He argued that the matters in dispute in this suit were directly and substantially adjudicated upon by the Land Disputes Tribunal. He submitted that under **Section 7 (Explanation 4)** of the **Civil Procedure Act**, the issues which the plaintiffs are seeking to canvass before this court were similar to the issues that were canvassed and determined by the Land Disputes Tribunal. He argued that the parties in the suit before the Land Disputes Tribunal were the same parties as in the present suit. Mr. Aboge maintained that the said award of the Narok Land Disputes Tribunal was adopted as the judgment of the subordinate court and a decree subsequently issued. He submitted that the plaintiffs wanted to re-litigate what was canvassed before the Land Disputes Tribunal before this court. He urged the court to find that the present suit was *res judicata*.

Mr Aboge further submitted that this court lacked the original jurisdiction to entertain the present suit.

He maintained that this court's jurisdiction could only be invoked in its appellate capacity. He argued that the Land Disputes Tribunal had jurisdiction to hear and determine the matter in dispute involving the suit land and if the plaintiffs were dissatisfied with its decision, they could only ventilate an appeal as envisaged by the said Act. He submitted that the plaintiffs had appealed to the Provincial Appeals Tribunal, which tribunal rendered a decision which was unfavourable to the plaintiffs. The said award of the Provincial Appeals Tribunal was adopted as a judgment of the court. Mr. Aboge submitted that the plaintiffs, failed to file their appeal to the High Court within the requisite period of sixty (60) days. He argued that the plaintiffs had filed the present suit in bid to ventilate their grievances in contravention of the provisions of the **Land Dispute Tribunal Act**. He urged the court to strike out the entire suit with costs.

Mr. Githui for the plaintiffs opposed the preliminary objection. He submitted that the preliminary objection was improperly taken since the present suit is not *res judicata*. He maintained that the proceeding before the Land Disputes Tribunal and the Provincial Appeals Tribunal were disputed. He submitted that the parties before the tribunal were not the same parties as the parties in this suit. He pointed an irregularity in the proceedings before the tribunal by stating that a party to the proceedings, one Njaaga Ole Loigero, was deceased even before the proceedings had commenced before the Narok Land Disputes Tribunal. He submitted that the tribunal was not a 'court' as envisaged by **Section 7 of the Civil Procedure Act**. He maintained that the 2nd plaintiff and the defendant were not parties before the Land Disputes Tribunal. He submitted that before a suit can be declared to be *res judicata*, the proceedings of the previous suit must be before a court of competent jurisdiction. It was his view that this court could not uphold the award of the Land Dispute Tribunal because the same was arrived at in contravention of **Section 3 of the Land Disputes Tribunal Act** which grants jurisdiction on the matters which the said tribunal can deal with.

Mr. Githui maintained that the tribunal did not have jurisdiction to deal with the matter in dispute between the parties and therefore its decision cannot subsequently thereafter raise a question of *res judicata*. He pointed an irregularity in the award by the tribunal where a witness was awarded land. He finally submitted that the High Court had original and unlimited jurisdiction in Civil matters as provided by **Section 60 of the Constitution**. He maintained that the matters in dispute in this suit relates to title to land, which matter the Land Disputes Tribunal did not have jurisdiction to hear and determine. He submitted that if the defendant desired to have the suit declared frivolous or vexatious, he ought to have filed an application under the provisions of **Order VI Rule 13(1) of the Civil Procedure Rules**. He urged the court to dismiss the preliminary objection with cost.

I have carefully considered the rival arguments made by the parties to this application. I have also read the pleadings filed by the parties to this suit. Before addressing the issues raised in this objection, it is important to set out the parameters in which a preliminary objection may be raised in a suit. As was held by Sir Charles Newbold, P in **Mukisa Biscuit Co. vs West End Distributors [1969] E.A 696** at page 701,

“A preliminary objection is in the nature of a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

In the present objection, it is clear that what constitutes the matters in dispute are contested. For instance, it has been contested by the plaintiffs that the parties in the present suit were not parties in the matter before the Narok Land Disputes Tribunal and the Provincial Appeals Tribunal. It has further been contested whether the Land Disputes Tribunal had jurisdiction to heard and determine the dispute before it. These are issues which will have to be ascertained. It is therefore evident that for a preliminary objection to be raised, the pleadings filed by the parties should be accepted by both party to be correct and should not raise any contentious issues. It is evident therefore that the present preliminary objection was improperly raised by the defendant.

No matter. This court will still address the issues raised in the preliminary objection. The defendant has objected to the plaintiff's suit on the ground that the present suit is *res judicata*. I accept the definition of

res judicata adopted by Ringera J, (as he was then) in **Omondi & Anor vs National Bank of Kenya & 2 others [2001] KLR 579** at page 587 where he held that;

“...the doctrine of *res judicata* would not apply only in situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a court of competent jurisdiction but also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined. Parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit.”

Section 7 of the Civil Procedure Act defines *res judicata* on similar terms except that under the **Civil Procedure Act** ‘a court’ is defined under **Section 2** as ‘the High Court or a subordinate court, acting in the exercise of its civil jurisdiction.’ In the present objection, the defendant has submitted that the present suit is *res judicata* because the matters in dispute in this suit had substantially been determined by the Narok Land Disputes Tribunal and the Provincial Appeals Tribunal. It is evident that the defendant has misapprehended the law. A tribunal is an inferior body which cannot be equated with the High Court or a subordinate court. A tribunal is therefore not ‘a competent court’ whose decision can attract the application of the doctrine of *res judicata* in a subsequent suit. The suit filed by the plaintiffs herein cannot therefore be said to be *res judicata* since no ‘competent court’ has adjudicated and determined the matters in dispute between the parties in this suit.

As to whether this court has jurisdiction to hear the matters in dispute in this suit, this court reiterates that it has original and unlimited jurisdiction to deal with the matter. The plaintiffs have pleaded, *inter alia*, fraud and misrepresentation on the part of the defendant. The Land Disputes Tribunal does not have jurisdiction to hear and determine matters where fraud or misrepresentation is pleaded. The Land Disputes Tribunal’s jurisdiction is limited to land disputes of a civil nature involving the division of, or the determination of boundaries to land, including land held in common; a claim to occupy or work land and trespass to land. (See **Section 3(1) of the Land Disputes Tribunal Act**). The Land Disputes Tribunal does not have jurisdiction to determine title to land, particularly where such land is registered land.

The plaintiffs have submitted that the Narok Land Disputes Tribunal heard the dispute relating to the suit land even though the person who dealt with the land was deceased. This is a matter which can only be determined by the High Court. This court can still upon hearing the parties, determine that the Narok Land Disputes Tribunal heard and properly determined the matters in dispute in this case. The court may again decide that the proceedings before the Narok Land Disputes Tribunal and the appeal to the Provincial Appeals Tribunal were null and void *ab initio*. That is however a matter which can only be decided when the court has heard the parties. It is only the High Court which has jurisdiction to determine such issues and not the Land Disputes Tribunal.

I need not say more. The upshot of the above reason is that the preliminary objection lacks merit and is hereby dismissed with costs to the plaintiffs.

DATED at NAKURU this 26th day of OCTOBER, 2007

L. KIMARU

JUDGE