REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

Civil Case 141 of 2007

MACHEO LIMITED.....PLAINTIFF

V E R S U S

JOSEPH WAFULA KHAOYA.....DEFENDANT

R U L I N G

This ruling is on a preliminary objection raised by the defendant. The Said preliminary objection is in the following terms;

> *" (a) THAT having a judgment which was regularly entered by a court of competent jurisdiction vide Kitale Senior Principal Magistrates' Court as Land Case No.39 of 1999 which determined the issues over the contract between the parties, the plaintiff's* ***entitlement was to a refund of the purchase price, and so it would be improper in law for the plaintiff to seek specific performance over the same contract in the High Court.***
>
> ***(b) The contract was invalid as it did not have the written Consent of the Agricultural Finance Corporation."***

When canvassing the objection, Mr. Maliro, learned counsel for the defendant, submitted that the suit herein is res judicata.

In that regard, he first pointed out that in paragraphs 15 and 16 of the Plaint, the plaintiffs had conceded that there is another suit between the parties to this suit. That other suit is SPMCC NO.39 of 1999.

It is the defendant's case that the issues determined in that other case were those that related to ownership of the suit property in issue, arising from an agreement of sale dated 1/10/1995.

It is common ground that the subject matter of the suit before me is a piece of Land L.R. NO.10288, SABOTI, South West of Kitale Municipality.
The property measures 670 acres.

It is also common ground that the defendant was the registered proprietor of the suit property.

There is also no dispute about the fact that the parties herein did execute two Agreements for the sale of some 140.7 acres of land, which was to be curved out from the suit property.

However, a dispute arose between the parties regarding the area which the plaintiff is said to have taken over, as the defendant felt that it was more than 140.7 acres. Also, the plaintiff is alleged to have wanted to take over trees which did not belong to him, as well as a cattle dip.

The dispute was referred to the Saboti Land Disputes Tribunal. The said tribunal ordered the defendant to refund to the plaintiff, the purchase price amounting to KShs.8, 360, 000/=. That sum was to be paid by the defendant within a period of two (2) years. Thereafter, the plaintiff was to vacate the suit property.

The decision of the tribunal was adopted as a judgment of the court in SPMCC NO.39 of 1999, and a decree was then issued on 13/4/2005.
It is the defendant's position that the said judgment was regular, as it had been issued by a court of competent jurisdiction. If the plaintiff was aggrieved with that judgment, the defendant says that the plaintiff should either have sought judicial review within 6 months, or alternatively, the plaintiff should have appealed to the Provincial Appeals Committee.

As the plaintiff did not utilize either of those two options, the defendant submits that it was not open to the plaintiff to re-open the same issues through a new suit. This suit should thus be dismissed, urged the defendant, as it may otherwise lead to the possibility of having two inconsistent decisions, by two different courts, on the same matter. As the issues raised herein had already been previously determined, and as the said determination had not been upset, the same were still in place, lawfully, and the defendant urged the plaintiff to execute the judgment.

In answer to the preliminary objection, the plaintiff submitted that the doctrine of res judicata had no application to this case, as there was no connection between this suit and SPMCC NO.39 of 1999. The only reason why the plaintiff disclosed the existence of that other case was said to be the need to comply with the requirements of the law.

In any event, the plaintiff is convinced that res judicata only came into play if the previous decision had been made by a court of competent jurisdiction.

In that regard, both parties are in agreement. The reason for that is to be found in section 7 of the Civil Procedure Act, which stipulates 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 the such issue has been subsequently raised, and has been heard and finally decided by such court."***

In this case, the plaintiff submits that the decision in SPMCC NO.39 of 1999 had not been made by a court of competent jurisdiction. The jurisdiction of the magistrate's court was put to question by the plaintiff because the matter it handled had commenced before the Trans-Nzoia Land Tribunal, under the Land Disputes Tribunal Act, 1990.

The jurisdiction of the tribunal, such as the one which handled the matter originally, is limited by Section 3 (1) of the Act. About that fact there is no dispute.
In this case, the plaintiff points out that the tribunal concerned had exceeded its jurisdiction, because it handled a dispute regarding the validity and enforceability of a

contract. Therefore, the plaintiff believes that the decision by the tribunal was incompetent.

If that be the case, then the plaintiff submits that the adoption of the incompetent decision, by the magistrate's court, was equally incompetent.
Section 3 (1) of the Land Dispute Tribunals Act provides as follows;

" Subject to this Act, all cases of a civil nature involving a dispute as to: –

(a) the division of, or the determination of boundaries to land, including land held in common;
(b) a claim to occupy or work land; or
(c) trespass to land, shall be heard and determined by a Tribunal established under section 4."

By virtue of section 7, the chairman of the tribunal shall cause the decision of the tribunal to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the Tribunal.

If any party to a dispute under section 3 of the Act is aggrieved with the decision of the Tribunal, he would be entitled to appeal to the Provincial Appeals Committee.

Section 8 (8) of the Act stipulates that on issues of fact, the decision of the Provincial Appeals Committee would be final. However, on issues of law, an aggrieved party may appeal to the High Court, within 60 days of the decision complained of.

In this case, the plaintiff did not appeal to the Provincial Appeals Committee. He also did not challenge the tribunal's decision or the decision of the magistrate's court through judicial review proceedings.

Can he nonetheless be permitted to prosecute this suit, which appears to be raising issues which had already been determined by the tribunal?

In the case of **MUHIA V MUHIA [1999] 1 E.A 209, at page 212,** the Court of Appeal expressed itself thus;

" ***It is established law that a judgment of a court without jurisdiction is a nullity. See Halsburys Laws of England (3rd edition) Volume 9 at 351. "where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing."***

As is clear from the express wording of the preliminary objection, the defendant concedes that the tribunal had ***"determined issues over contract between the parties.***"

Even though it did so, the tribunal did not have jurisdiction to do so. In other words, it was not competent to adjudicate on issues of contract. To that extent, the issues of contract had not yet been adjudicated by a court of competent jurisdiction, because whatever decision was arrived at by the tribunal amounted to nothing.

In "Halsburys Laws of England" 4th Edition, Volume 16, at paragraph 975, the learned authors spell out the essentials of res judicata. This is what they say;

> ***" In order that a defence of res judicata may succeed it is necessary to show not only that the cause of action was the same but also that the plaintiff has had an opportunity of recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the second. . . . . It is not enough that the matter alleged to be estopped might have been put in issue, or that the relief sought might have been claimed. It***

is necessary to show that it actually was so put in issue or claimed."

In this case, the claim is for specific performance. It seeks to have the defendant compelled to facilitate the transfer of land to the plaintiff.

First, the defendant has not demonstrated to me that that issue was placed before the tribunal, and that the tribunal did make a decision thereon. But even assuming that the issue was adjudicated upon by the tribunal, in law, the tribunal had no jurisdiction to handle such an issue. Therefore whatever decision the tribunal may have arrived at amounts to nothing.

Had I arrived at a decision that the tribunal had acted within its jurisdiction, and that the judgment of the learned magistrate was regular, I would not have hesitated from reiterating the following words which I used in ***AZIZ NDAMWE Vs MARIAM ANJAO NDAMWE & ANOTHER, KITALE HCCC. NO.54 OF 1999;***

" . . . the applicant ought not to be allowed to use a round-about route to challenge the decision of the Land Dispute Tribunal, after he had failed to lodge an appeal with the Provincial Appeals Committee, within 30 days of the decision by the Tribunal. I also held that the only other avenue available to the applicant, in that case, was to have instituted judicial review proceedings, with a view to quashing the decision of the Land Disputes Tribunal."

Whilst I am still persuaded that the aforestated words spell out the proper legal position, I nonetheless find myself asking, if, given the circumstances prevailing in this case, I could disregard what appears to be a concession that the tribunal never had jurisdiction in the first instance. What I am referring to as a concession is to be found within the wording of the preliminary objection cited at the outset of this ruling. It is the fact that the tribunal is said to have made a decision on a contract. To my mind, the answer is that once the parties agreed that the contract between them was one of the issues that was placed before the tribunal, for determination, the court cannot ignore that fact .

At the same time, I am fully aware of the defendant's contention that by allowing this matter to proceed, the court may ultimately arrive at a decision that was different from the judgment of the learned magistrate, in SPMCC Land Case No.39 of 1999. Ordinarily, it is with a view to avoiding such a scenario that parties are shut out from bringing separate suits to challenge, directly or indirectly, decisions of tribunals, if such parties had not come by way of judicial review.

The legal issues raised are intricate. I hold that the most efficacious manner of determining them is not through this preliminary objection, but through more substantive proceedings. I therefore decline to strike out or to dismiss the suit. In other words, the preliminary objection is overruled.

However, the costs thereof shall abide the hearing and determination of the action.

Dated and Delivered at Kitale, this 26th day of November, 2007.

FRED A. OCHIENG
JUDGE