

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
Civil Suit 108 of 2005

JOHN KIPTOO SIREN PLAINTIFF

VERSUS

CHALRES K. OMBOI 1ST DEFENDANT

JEREMIAH ONTIRI 2ND DEFENDANT

THE CHAIRMAN ITEN LAND DISPUTES TRIBUNAL

THROUGH THE ATTORNEY GENERAL 3RD DEFENDANT

RULING

Following several attempts by John Kiptoo Siren to restrain and evict Charles Omboi and Jeremiah Ontiri from a portion of ¼ of an acre of ELGEYO MARAKWET/IRONG/ITEN/520 (‘the subject land’), which the former claims is his land, Siren has instituted this suit which he seeks an order to declare that he is the absolute owner of the said land and in which case the two should be ordered to vacate the same and that they be restrained from interfering with the land in any manner.

Charles Omboi and Jeremiah Ontiri who appear in this suit as the 1st and 2nd defendants have raised this preliminary objection in which they claim that not only is the suit against them res judicata but that it offends the provisions of Order VII rule 1 of the Civil Procedure Rules and that the plaintiff should not be heard until he settles their costs in the previous suits and which were assessed at Shs. 108,240/=. It is also their contention that otherwise the suit is incompetent, defective and an abuse of the process of the Court.

I have taken the submissions of both very able counsel, and I have also taken cognisance of the depositions by both sides as well as the annexure to the supporting and replying affidavits. Mr. Kuloba, the defendants’ learned counsel urges this Court to find that the suit is res judicata and that it cannot lie, in support of which he has had annexed to the replying affidavit a copy of the plaint and ruling in a suit, which Siren had filed against these two at Iten, namely Iten RMCC No. 59 of 2003 in which the learned trial Magistrate had found that “*the matter directly and substantially in issue in this suit were heard and finally decided by the Tribunal.*” He also found that “*in fact the respondent (Siren) never appealed against the decision of the Tribunal No. 2/2003. The suit therefore being res judicata does not disclose any reasonable cause of action*”. He then proceeded to dismiss the suit with costs to the two.

Faced with that type of my ruling, it is now my duty to establish whether this preliminary objection can be sustained on the grounds that this suit is res judicata.

It is common ground that the subject land is registered land. It is trite law that District Land Tribunals shall not have the jurisdiction to hear and determine matters pertaining to registered land. Given that position in law, I am unable to understand how the decision which was made by the Tribunal and which the learned trial Magistrate at Iten seeks to support, could be deemed as an enforceable decision. In my humble opinion, such a decision would obviously be null and void and it cannot be the basis for finding that the suit was “deliberated upon and fully determined”. The issue of res judicata cannot therefore arise; and the preliminary objection cannot be sustained on that ground.

Though the two have taken issue with the verifying affidavit, which in their opinion, offends Order VII rule 1 of the Civil Procedure Rules, Counsel did not address the issue and I can only assume that he

abandoned it. I have nevertheless looked at the relevant section of the law and the pleadings herein and I am convinced that the pleadings comply with the said legal requirements.

I have otherwise looked at the other grounds on which this preliminary objection is based and in my view the issue of whether fees in earlier suits was paid is not a matter of law. It cannot be raised in a preliminary objection, which can only be raised on pure matters of law.

I do in the circumstances find that the preliminary objection cannot be sustained. It is hereby dismissed.

Costs shall however be in the cause.

Dated and delivered at Eldoret this 2nd day of May 2006.

JEANNE GACHECHE

Judge

Delivered in the presence of:

Mr. Kathili for the plaintiff, Mr. Kutwa for the 1st and 2nd defendant, No appearance for 3rd defendant.