



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 137 of 2003**

**MURAYA WANDUNGU.....**  
**PLAINTIFF**

**VERSUS**

**NAOMI WANJIRU WANDUNGU.....DEFENDANT**

**RULING**

The claim in this suit involved a land dispute between the plaintiff and his sister in law. The plaintiff filed this suit by way of a plaint on 12th August 1993 at Naivasha being **NAIVASHA SRM CC NO.144 OF 1993**. The plaintiff sought orders that the defendant be evicted from the suit land being LR NO. NYANDARUA/KARATI/531 claiming that she was a trespasser. The defendant filed a defence denying the claim and also filed a counter claim in which she claimed that the suit land was jointly purchased by the plaintiff and her late husband who is brother to the plaintiff in 1968 and she sought orders that the plaintiff do transfer her portion to her.

The suit was later transferred to Nakuru Chief Magistrates Court where it was registered as **CMCC NO. 2876 OF 1996**. Since the claim was trespass over land and sought orders for eviction it was consented by both parties that the dispute be referred to the Tribunal under the Land Dispute Act. The matter was referred to Nyandarua Land Disputes Tribunal. The dispute was heard on 23<sup>rd</sup> June 1998 under the Chairmanship of the District Officer assisted by two elders nominated by the parties. Each party was allowed to call witnesses. One of the witnesses who gave evidence before the Tribunal was Mungai Njoroge the elder brother of the plaintiff and the husband of the defendant who is now deceased.

He testified that he was called as a witness when the plaintiff and his late brother purchased the suit land jointly. The Tribunal deliberated over the dispute and filed its award in court. The award read in part:

***“Land parcel L.R NO. NYANDARUA/KABATI/392 be divided into two equal portions and half of the land to be registered in the name of the defendant Naomi Wandungu and the other half to be registered in the name of the plaintiff Muraya Wandungu.”***

The award of the Tribunal was confirmed and adopted as the judgment of the court by the Nakuru

Senior Resident Magistrate. The plaintiff applied to Nakuru High Court for Judicial Review being MISC. APPLICATION NO. 63 OF 2001. But the application was dismissed. The plaintiff appealed to the Court of Appeal for stay of execution pending an appeal from that ruling of the High Court at Nakuru by Rimita, J. CIVIL APPEAL NO. 330 OF 2001.

That application was dismissed. The Court of Appeal in dismissing that application had this to say: -

***“The principles upon which this court acts in an application of this nature are now well settled.***

***First the appellant has to demonstrate that the intended appeal is likely to succeed or that it is not frivolous.***

***Secondly, the appellant has to show that the appeal would be rendered nugatory if the orders sought are not granted.***

Mr. Akhabi did not satisfy us on either of these issues. Nor are we persuaded that the intended appeal is arguable or that it would be rendered nugatory if the orders sought are not granted.

The plaintiff having lost the appeal came to the High court in Nairobi and filed another suit by way of a plaint being HCCC NO. 137 OF 2003 seeking the following orders:

- (a) A declaration that the award of Nyandarua District Land Disputes Tribunal dated 23<sup>rd</sup> June 1998 is a nullity.
- (b) A declaration that the plaintiff is the absolute owner of the suit land NYANDARUA/KABATI/392 to the exclusion of the Defendant
- (c) An order that the defendant, her agents or employees be evicted from LR NO. NYANDARUA/KABATI/392 forthwith.
- (d) Costs.

The Defendant on being served with summons filed a defence in which he contends that the suit is resjudicata citing the decision in NAKURU CMCC NO.2876 OF 1996 which culminated in Nakuru High Court Misc. Application No.63 of 2001 and subsequently Court of Appeal Misc. Application No.330 of 2001. Lastly he contends that this suit is not only an abuse of the due process of the court but is grossly incompetent and the defendant will at the hearing of the same seek to have the same struck out with costs as the same is resjudicata.

When the matter came up for hearing Mr. Kimatta counsel for the defendant raised a Preliminary Objection on a point of law. He submitted that the present suit is resjudicata as the issues raised therein have been heard and determined. He cited Nakuru CMCC NO. 2876 of 1996 in which similar issues were determined. The dispute was by consent referred to the Nyandarua District Land Disputes Tribunal which decided the same in favour of the defendant. The award was confirmed and adopted as the judgment of the court. The plaintiff filed an application in the High Court at Nakuru for Judicial Review seeking orders of certiorari to issue directed to both the Nyandarua District Land Disputes Tribunal and the Chief Magistrates Court Nakuru, to bring the entire record of the proceedings taken and orders made by the Nyandarua District Land Disputes Tribunal in Nyandarua District Land Disputes Tribunal case No.48 of 1998 and the Chief Magistrate’s Court Nakuru in NAKURU CMCC NO. 2876 OF 1996 so that the same may be examined by this court for their legality and quashed.

The application was dismissed with costs by Rimita, J and the appeal to the Court of Appeal challenging that decision of Rimita, J was dismissed as well. The Preliminary Objection is opposed by Mrs. Kinuthia who submitted that this matter is not resjudicata on the ground that although the parties are the same, it is clear from the pleadings the defendant is not claiming under the same title.

In Nakuru CMCC NO. 2876 OF 1996, the defendant Naomi Wandungu filed her defence and counter-claim as the Legal Administrator of the Estate of her late husband Wandungu Njoroge. She was seeking orders that LR NO NYANDARUA/KABATI/531 be subdivided and half of that portion be transferred to her. In the instant suit she has not filed her defence in her capacity as the Legal Administrator of the Estate of her deceased husband but in her own personal capacity as a person who has trespassed into the plaintiff land.

The matter that were raised in the NAKURU CMCC NO. 2876 OF 1996 were not tried by a court of competent jurisdiction because the matter was referred to Nyandarua Land Disputes Tribunal which had no jurisdiction to deal with disputes over title. The relevant statute which deals with title is RLA Cap 300 and therefore the Elders Award dated 23<sup>rd</sup> June 1998 was a nullity and the same could no be confirmed and adopted as a judgment of the court. The matters which were directly and substantially in issue in the CMCC NO. 2876 OF 1996 were not heard and finally decided on merit as required in law.

There are two issues raised in this matter. One is whether or not the suit is resjudicata and two whether or not the Nyandarua District Land Disputes Tribunal had jurisdiction to entertain the suit. In order that a decision in a former suit may operate as resjudicata in a subsequent suit, it is necessary that the court which tried the former suit must have been a court competent to try the subsequent suit. ***Res judicata*** by its very words means a matter on which the court has exercised its judicial mind and has after argument and consideration come to a decision on a contested matter. The mere fact that a matter directly and substantially in issue in a former suit is not sufficient to constitute the matter resjudicata; it is also essential that it should have been heard and finally decided.

The parties in the NAKURU CMCC NO. 2876 OF 1996 were MURAYA WANDUNGU as the plaintiff against NAOMI WANJIRU WANDUNGU as the defendant and the dispute was over the same title. And the parties in the instant suit HCCC NO.137 OF 2003 are MURAYA WANDUNGU as the plaintiff and NAOMI WANJIRU WANDUNGU as the defendant. It is apparent that the issues in the instant suit were directly and substantially in issue in the former suit instituted between the same parties.

The next issue is whether or not the Tribunal had jurisdiction to entertain the suit. The Tribunal is a creature of an Act of Parliament – Land Disputes Tribunal Act No.18 of 1990.

Section 4 provides: -

***“4(1) There shall be established a tribunal to be called Land Disputes Tribunal for every registration district.***

***(2) Each Tribunal shall consist of:-***

***(a) A Chairman who shall be appointed from time to time by the District Commissioner from the panel of elders appointed under Section 5 of the Act.***

***(b) Either two or four elders selected by the District Commissioner from a panel of elders appointed under Section 5 of the Act.”***

Jurisdiction is provided for under Section 3 of the Act which provides:-

***“3(1) Subject to this Act all cases of 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.”***

The genesis of this dispute is a suit by way of a plaint filed by the plaintiff against the defendant in the

SRM's COURT NAIVASHA being CIVIL CASE NO. 144 OF 1993 which was later transferred to NAKURU CHIEF MAGISTRATES COURT and given a new number being CMCC NO. 2876 OF 1996. Paragraph 4 of the plaint states that the defendant and her servants and agents had trespassed upon his land and sought order for their eviction.

This places the dispute under the ambit of Section 3 of the Land Disputes Tribunal Act. The dispute was referred to the Tribunal by consent of both parties. They appeared and participated in the proceedings before the tribunal. They called witnesses who testified and the Tribunal made an award which was filed in court and the same was confirmed and adopted as a judgment of the court.

The plaintiff having surrendered to the jurisdiction and having appeared before the tribunal and participated in the due process, he cannot be heard to say that the decision reached by the tribunal was a nullity for lack of jurisdiction.

The other issue raised by Mrs. Kinuthia is that the matter was not heard on merit.

A matter will be said to have been "***heard and finally decided***"\_ notwithstanding that the former suit was disposed of in any of the following ways:-

- (i) ex parte
- (ii) by a decree on an award
- (iii) by dismissal owing to the plaintiff's failure to adduce evidence at the hearing.

The court having made a finding that the issues raised in the instant case were directly and substantially in issue in the former suit comes to the conclusion that this suit is resjudicata and therefore it is struck out with costs to the defendant.

Dated and delivered at Nairobi this 27<sup>th</sup> of June, 2006.

**J.L.A. OSIEMO**

**JUDGE**