



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**Civil Suit 48 of 1998**

**HENRY GITONGO WAMBURA.....PLAINTIFF**

**VS**

**DR. A.H. SHETH.....DEFENDANT**

**RULING**

The subject matter of this ruling is the Notice of Preliminary Objection dated 16<sup>th</sup> November 2004 which read in part as follows:

“Notice of Preliminary Objection to the hearing of the suit.

- (a) *Tenancy issue was fully determined vide Tribunal case no. 25 of 1998.*
- (b) *An appeal preferred against the Tribunal’s case No. 25 of 1998 was fully heard and determined by this court vide Civil Appeal No. 88 of 2000 and that the issues being raised in Civil case No. 48 of 1998 are resjudicata.”*

When this suit came up for hearing M/s Lucy Nanzushi for the Defendant was granted leave to argue the preliminary points raised in the aforesaid notice. The learned advocate urged this court to have this suit struck out because she was of the view that this court had no jurisdiction to hear and determine the dispute because it involved a protected tenancy under the provisions of the Rent Restriction Act Chapter 296 Laws of Kenya. She argued that the dispute was within the ambit of the Rent Tribunal established under the Provisions of Section 4 of the Rent Restriction Act.

Mr. Samba who appeared for the plaintiff resisted this argument and retorted that there was no tenancy relationship between the plaintiff and the defendant. He termed the defendant as a mere trespasser. Mr. Samba further cited the provisions of Section 60 of the constitution to support his contention that this court had unlimited jurisdiction in dealing with both civil and criminal cases.

On the second preliminary point, the defendant argued that this suit should be struck out because it is resjudicata. M/s Nanzushi pointed out that similar issues were raised before the Rent Tribunal sitting at Kakamega vide Kakamega R.R.T.C. No. 25 of 1998 between Dr. Arunkumar Seth and Henry Gitonga Mwambura. It was averred that the Rent Tribunal heard and determined these issues. The defendant further said that an appeal against the decision was lodged in this court and this court gave a decision in a Judgment delivered on 28<sup>th</sup> November 2001 vide Bungoma H.C.C.A. No. 88 of 2000.

On his part Mr. Samba for the plaintiff denied that this suit resjudicata. He said that the Rent Tribunal had no Jurisdiction to hear matters revolving on the determination of whether a tenancy is

protected or not. He said, that was the jurisdiction of Civil courts. The learned advocate went further to argue that the issues raised before the Rent Tribunal were only in respect of (i) assessment of rent and (ii) compensation in the sum of Ksh.210,000/=. He was of the view that the plaint herein raised completely different issues from those agitated before the Rent Tribunal and before this court on appeal. It was also argued that this court is not bound by the decision of the Rent Tribunal hence the action is not resjudicata.

It is imperative to lay down the background of dispute now before this court before deciding on these critical issues as ventilated by the parties.

By an amended plaint dated 23<sup>rd</sup> May 1999, Henry Gitonga Mwambura, the plaintiff herein sought for the eviction of Dr. Arunkumar Seth from residential premises standing on Plot No. 301 Bungoma township. The plaintiff also prayed for mesne profits at the rate of Ksh.4,500/= per month from 1<sup>st</sup> January, 1998 until the date of Judgment. He further sought for costs of the suit plus interest.

When served with this amended plaint the defendant filed an amended defence dated 20.7.99 to challenge the plaintiff's action. In that defence Dr. Arunkumar Seth said that the issue of increase of rent had not been agreed upon. He also complained that the issue had been heard and determined by the Rent Tribunal and by this court on Appeal. He went further to point out that the rent payable per month still stood at Ksh.2,000/=. He denied jurisdiction of this court claiming that he is a protected tenant.

I have perused the court record and I have not seen a reply to the amended defence. The following facts appear to me to be uncontested:

***(i) That the parties appeared before the Rent Tribunal sitting at Kakamega where they were heard and the Tribunal made a decision dated 21.9.2000 in the following terms:***

*“(a) The tenancy being controlled the defendant is now hereby permanently restrained from increasing the rent as assessed at Ksh.2,000/= P.M. except by application and with an order of this court.*

*(b) The defendant is to compensate the plaintiff in the sum of Ksh.160,000/= which the plaintiff with the authority of the previous landlord used to renovate the house. Once the said amount is settled by the defendant, he is to give the plaintiff six months notice to vacate the premises.*

*(c) The plaintiff is to continue paying to the defendant monthly rent of Ksh.2,000/=.*

*(d) The defendant to pay the plaintiff the cost of this suit and interest at court rates.”*

*(ii) That the aforesaid Rent Tribunal's decision was challenged in the High court vide Bungoma H.C.C.A no. 88 of 2000 in which this court gave the Judgment dated 28.11.2001 in the following terms:*

*“(a) The Rent Tribunal has jurisdiction to deal with matters arising from a tenancy as provided for by Section 2 (1) of the Rent Restriction Act.*

*(b) There was no evidence to hold that the new Landlord was to take over liability due to renovation from the outgoing landlord.*

*(c) The Rent Tribunal had no jurisdiction to determine matters relating to compensation arising from renovation.*

*(d) The tribunal's Judgment can only be faulted with regard to the award on compensation.*

*(e) The award of compensation in the sum of Ksh. 160,000/= is set aside.”*

Having set out the relevant matters in this dispute it is now important to consider the merits of each of the preliminary issues argued by the learned advocates. On the first issue as to whether this court is possessed with jurisdiction or not to entertain the action. I find the first issue to have intertwined with the second preliminary point which is to the effect that this action is resjudicata. For clarity, I will repeat that the defendant's view is that this action involves a protected tenancy, hence it should have been agitated before the Rent Tribunal. It was further pointed out that the dispute was heard and determined by both the tribunal and this court. In the amended plaint the plaintiff avers that there existed no tenancy relationship between him and the defendant. His counsel argued before this court that even if the matter had been heard and determined by the Rent Tribunal still the decision cannot bind this court. I purposely reproduced the relevant contents of the decisions of the Rent Tribunal in Kakamega Rent Tribunal case No. 25 of 1998 and that of this court vide Bungoma H.C.C.A. No. 88 of 2000. The truth of the matter is that the Rent Tribunal held the view that the defendant, Arunkumar Seth, is a protected tenant. That view was confirmed by this court on appeal. It is trite law that where a matter has been heard and determined by a competent court it cannot be reagitated. To do so amounts to resjudicata. In this case, the issues touching on tenancy and eviction were heard and determined by the Rent Tribunal and upheld by this court on appeal. It is not open to the aggrieved party to reopen the matter again via a separate suit because this court cannot sit on appeal on its own cause. This court only gains jurisdiction to determined matters relating to controlled tenancies under section 8 of the Rent Restriction Act Cap. 296 Laws of Kenya. The prayers set out in the plaint are matters which can only be ventilated in the Rent Tribunal. They are clearly defined under Section 5 of the Rent Restriction Act. This court cannot descend into the arena in this dispute. Let the parties appear before the right and competent forum.

The upshot therefore is that the preliminary objection is sustained with a resultant order that the suit is ordered struck out with costs to the defendant.

**DATED AND DELIVERED THIS 13<sup>th</sup> DAY OF May 2005**

**J.K. SERGON**

**JUDGE**