



**Kulecho v Kulecho & another (Environment & Land Case  
E015 of 2021) [2023] KEELC 17088 (KLR) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17088 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE E015 OF 2021**

**DO OHUNGO, J**

**MAY 3, 2023**

**BETWEEN**

**KASSIMU SUNGURA KULECHO ..... PLAINTIFF**

**AND**

**NORAH NYAKOA KULECHO ..... 1<sup>ST</sup> DEFENDANT**

**BUTALI SUGAR MILLS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By Notice of Motion dated 20<sup>th</sup> September 2022, the defendants seek striking out of this suit for being res judicata. They also seek costs of both the application and the suit.
2. The application is supported by an affidavit sworn by the first defendant who deposed that the dispute herein was initially litigated before the Kabras Land Dispute Tribunal whose award was adopted as a judgment of the court vide Kakamega CM Misc. Appl. Award No. 96 of 2002 whereby land subdivisions numbers Kabras/Malava/2357, 1648 and 1649 were ordered cancelled and the land reverted to its original number Kakamega/N.Kabras/Malava/1206 in the first defendant's name. She further deposed that she lawfully sold the suit land to the second defendant who is the current registered owner. That sometime in 2007, the plaintiff filed Kakamega HCC No. 82 of 2007 over the same suit property which suit was later transferred to the Chief Magistrate's Court at Kakamega as Kakamega MCLE No. 94 of 2018 and subsequently transferred to Butali Courts as Butali ELC. No. 24 of 2018 and later struck out for being res judicata. That the plaintiff also filed Kakamega ELC No. 336 of 2014 through a buyer, which suit was heard and dismissed.
3. In response, the plaintiff filed a replying affidavit in which he deposed that he was the first registered owner of land parcel number Kakamega/Malava/1206 and that his registration as the owner of the suit property was illegally cancelled by the Kabras Land Dispute Tribunal which lacked jurisdiction to cancel the title deed. He further deposed that he has never been given an opportunity to ventilate



his case against the first defendant since there have always been technicalities of law to deny him an opportunity to be heard. That the first defendant was not entitled to be registered as the owner of the land on the basis of an order issued by an institution which lacked jurisdiction. He added that the first defendant is raising the issue of res judicata to hide her fraudulent acts which led to the cancellation of the plaintiff's title and that if the application is allowed, the plaintiff will be denied an opportunity to ventilate his case.

4. The application was canvassed through written submissions.
5. The applicants submitted that the subject matter herein Kakamega/Malava/1206 had already been dealt with and finalised in the above stated cases and that consequently, the suit is res judicata. Relying on section 7 of the *Civil Procedure Act* and the case of Nicholas Njeru v The Attorney General and 8 Others [2013] eKLR, the applicants urged the court to allow their application.
6. In response, the plaintiff argued that the Kabras Land Dispute Tribunal lacked jurisdiction to issue orders cancelling his registration as the first registered owner of the suit property and as such the issue of his cancellation as the registered owner of land parcel number Kakamega/Malava/1206 has never been heard and determined by a court of competent jurisdiction and that in the absence of any substantive suit to determine the circumstances under which the plaintiff's cancellation as the proprietor of the suit land was done, then the issue cannot be deemed to be res judicata as the issue has not been determined on merit by a court of competent jurisdiction. He urged the court to dismiss the application.
7. I have considered the application, the affidavits, and the submissions. The sole issue for determination is whether the suit is res judicata. For res judicata to apply in a particular matter, there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit. See *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR and *Maithene Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others* [2018] eKLR.
8. A reading of the plaint in this matter shows that the plaintiff seeks cancellation of registration of the first and second defendants as owners of land parcel number Kakamega/Malava/1206 so that ownership reverts to the plaintiff. Within the body of the plaint, the plaintiff acknowledges that he lost ownership of the property through an award of the Kabras Land Dispute Tribunal which was adopted as a judgment of the court vide Kakamega CM Misc. Appl. Award No. 96 of 2002. The plaintiff herein and the first defendant were parties to both the tribunal and adoption proceedings. While the plaintiff is arguing that the tribunal lacked jurisdiction, it must be noted that both the ward of the tribunal and its adoption remain in force and their setting aside or nullification are not sought in this case.
9. Equally, it is not in dispute that another case being Kakamega HCC No. 82 of 2007 was filed later transferred to the Chief Magistrate's Court at Kakamega as Kakamega CM ELC No. 94 of 2018 and subsequently transferred to Butali Courts as Butali SRM ELC. No. 24 of 2018. A perusal of the plaint shows that the plaintiff herein and the first defendant were parties to the case and that the plaintiff herein, who was one of the plaintiffs in the case, sought among others a declaration that the proceedings and award of the tribunal were null and void. The case was struck out through a ruling delivered on 7<sup>th</sup> October 2019, for being res judicata. The present case is not an appeal against the said ruling.



10. While the law relating to jurisdiction of the defunct land dispute tribunals is not in doubt, its application to a specific case must be the subject of legal determination in the case. The Supreme Court stated as follows in *Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others* [2015] eKLR:

(43) The High Court held that it indeed had jurisdiction to nullify an award of a tribunal, if such an award was made outside the tribunal's jurisdiction. ... However, the Court held that its jurisdiction is only exercisable where such decision of the tribunal has not transmuted into a judicial determination, through adoption as a Judgment of the Court.

(44) Consequently, the High Court declined to grant the Orders sought, stating that the award of the Borabu Land Disputes Tribunal having been adopted by the Senior Resident Magistrate's Court at Keroka, ceased to exist on its own, and thus, could not be the subject of a declaration. The High Court further observed that even if the declaration was to issue with regard to the Tribunal's award, it would have no effect as the decree that emanated from the lower Court's Judgment had not been challenged by the plaintiff. The learned Judge further held that, upon an award becoming a Judgment of a Court of competent jurisdiction, it can only be varied, vacated, set aside or reviewed by the same Court, or by an appellate Court in appropriate proceedings.

(46) Consequently, the High Court (Makhandia, J) dismissed the applicant's suit with costs to the respondents, on 29<sup>th</sup> October, 2010.

(47) Aggrieved by that decision, the applicant moved the Court of Appeal at Kisumu, with Civil Appeal No, 184 of 2011. The appeal was premised on grounds that the High Court had failed to find that the Land Disputes Tribunal lacked jurisdiction to deal with title to land, and so its decision was null and void.

(48) The Court of Appeal, in a decision rendered on 19<sup>th</sup> September 2014, dismissed the appeal, upholding the High Court's position. The Appellate Court observed:

"The appellant in this appeal did not challenge the decision of the tribunal in accordance with the said procedure set out in the Act. Neither were judicial review proceedings taken to quash the award. The appellant instead chose to file the suit for declaratory orders and compensation..."

[50] ... the applicant has not demonstrated that the High Court or Court of Appeal, in this matter, held a view inconsistent with the recognized jurisprudence on this issue.

11. As long as the award of the Kabras Land Dispute Tribunal and its adoption remain standing, the plaintiff cannot re-litigate the question of whether his title to the suit property was validly cancelled by the tribunal. I agree with the applicants that this suit is res judicata.

12. Notice of Motion dated September 20, 2022 has merit. In the result, I strike out the plaintiff's case with costs to the defendants.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 3<sup>RD</sup> DAY OF MAY 2023.**

**D. O. OHUNGO**



## **JUDGE**

Delivered in open court in the presence of:

No appearance for the plaintiff

Mr Getanda for the defendants

Court Assistant: E. Juma

