REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

MISC APPLICATION NO.7 OF 2011

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

IN THE FORM OF CERTIORARI

AND IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT NO.18 OF 1990

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT AND RULES

AND

IN THE MATTER OF LAND REFERENCE NO. NAROK CIS MARA/ILMOTIOK/21

AND

IN THE MATTER OF THE PROVINCIAL LAND DISPUTES COMMITTEE

AND

IN THE MATTER OF NAROK SENIOR PRINCIPAL MAGISTATES MISC

LAND CASE NO. 3 OF OF 2010

AND

IN THE MATTER OF SECTIONS 8 AN 9 OF THE LAW REFORM ACT CAP 26 OF THE LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE CHAIRMAN PROVINCIAL

LAND DISPUTES TRIBUNAL COMMITTEE.....1ST RESPONDENT

THE SENIOR MAGISTRATES COURT NAROK.....2ND RESPONDENT

EVALINE TUIYA.....3RD RESPONDENT

EX-PARTE

LEDAMA LELEI.....SUBJECT/RESPONDENT

RULING

1. This ruling relates to a preliminary objection raised by the Exparte Applicant in response to application dated 28th August, 2019. The notice to raise the preliminary objection is dated 26th November, 2019 and the objection is as follows:

> *That the application is Res judicata and is therefore barred as provided in Section 7 of Civil Procedure Act.*

2. It appears clear that the Exparte Applicant – **LEDAMA LELEI** – won the judicial review in this matter, which was between him and three respondents – **THE CHAIRMAN PROVINCIAL LAND DISPUTES TRIBUNAL COMMITTEE** (1st Respondent), **SENIOR PRINCIPAL MAGISTRATE – NAROK** (2nd respondent) and **EVALINE TUIYA** (3rd respondent). The first two respondents did not participate in the proceedings and when the court pronounced itself on the dispute, it ordered the only respondent who participated, that is to say **Evaline Tuiya**, to pay costs. This party is the applicant in the application about which the objection is raised. As pointed out earlier, that application is dated 28th August, 2019.

3. The Exparte Applicant commenced the process of execution for costs hoping to bring the matter to a closure. But the 3rd respondent – **EVALINE TUIYA** – filed an application dated 27th February, 2019 seeking various orders as follows:

> *1. That the application be certified urgent and be heard exparte in the first instance.*
>
> *2. That pending the hearing and determination of this application interpartes, this honourable court be pleased to restrain the subject/respondent by himself, his agents, servants, or any person or entity acting on his instructions, from attaching, advertising for sale, selling, or in any other way interfering with the 3rd Respondents/Applicants property.*
>
> *3. That this honourable court be pleased to set aside the certificate of costs issued by this court and the subjects/respondents bill of costs.*
>
> *4. That consequently, this honourable court be pleased to apportion costs among all the respondents in this suit.*

4. The court heard the application and dismissed it vide a ruling delivered on 3rd July, 2019. That would seem to have cleared the way for the Exparte Applicant to continue with the process of execution. But the 3rd respondent came up with yet another application, a notice of motion dated 28th August, 2019, which is the reason or basis of the objection now under consideration. The second application has the following prayers:

> *1. That this honourable court be pleased to certify this application as urgent, and be heard on priority basis.*
>
> *2. That pending the hearing and determination of this application interpartes this honourable court be pleased to restrain the respondent/subject, by himself, his agents or servant from attaching, advertising for sale, selling, or in any other way interfering with the 3rd Applicant/Respondents property.*
>
> *3. That this honourable court be pleased to strike out the Respondent/Subject bill of costs dated 4th April, 2016, the certified of costs dated 12th July, 2016 and a consequent application for execution of a decree.*
>
> *4. That the costs of this application be borne by the respondent/subject.*

5. It is this second application which the Exparte Applicant says is *RES JUDICATA*. The objection raised was canvassed by way of written submissions. The Exparte Applicant submissions were filed on 6th March, 2020 while the submissions of the 3rd Respondent had been filed earlier on 13th February, 2020.

6. The Exparte Applicant submitted, interalia, that the 3rd Respondent had an earlier application dated 27th February, 2019 which was generally similar to the one she filed later. That application was disallowed by the court vide a ruling delivered on 3rd July, 2019. The latter application was said to be meant to achieve what the earlier application did not. The Exparte Applicant is saying that the two applications are the same though abit differently worded. For further persuasion, the Exparte Applicant cited the cases **of E.T VS. ATTORNEY GENERAL & ANOTHER (2012)eKLR, CHRISTOPHER ORINA KENYARIRI T/A KENYARIRI & ASSOCIATES ADVOCATES VS SALAMA BEACH HOTEL LIMITED & 3 OTHERS (2017)eKLR AND GURBACHAM VS YOWANI EKORI (1956) EA 450**.

7. On her part, the 3rd respondent submitted, interalia, that the present application and the earlier application dated 27th February, 2019 "*are different for all purposes and intent and relies (sic) on different statutes provided for in Civil Procedure Rules*." This court was urged to allow the application.

8. I have considered the rival submissions filed by both sides and I have had a look into the two applications which form the basis of the objection now under consideration. Earlier in this ruling, I set out *Ipsissma Verba* the substance of the prayers in the two applications. Each of the application has four prayers and it is clear to me that the first three prayers in each application are substantially similar. It is only the last prayers that are different, with the earlier application asking for apportioning of costs among respondents while the latter application is asking that costs of the application be borne by the Exparte Applicant, called "Respondent/Subject" in the prayer.

9. And the general theme of the application is the same, with both challenging the manner in which the Exparte Applicant wants to proceed with execution.

10. Res judicata is about conclusiveness of court decisions, about the need not to vex a party twice over the same issue or litigation, and about the need to bring matters to a closure. It is also about the need to prevent misuse of judicial fora by litigants who are never prepared to accept defeat. It saves judicial time and saves expenses for the parties.

11. The scope of the doctrine of *res judicata* was captured well by the Exparte Applicant in **Gurbacham's case** (*supra*) quoted as enunciated in the case of **Henderson Vs Henderson (1) 67 ER 313** as follows:

> *"In trying the question I believe I state the rule of the court correctly when I say that, when a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res-judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time"*

In simple terms, *res judicata* is meant to apply not only to what has already been litigated upon in a given matter but to what ought to have been litigated but was not.

12. This same point was made by Richard Kuloba in his seminal book: **JUDICIAL HINTS ON CIVIL PROCEDURE: LAW AFRICA PUBLISHING (K) LTD, 2nd EDITION**, at page 47. Kuloba expressed himself thus:

> *"The test whether the suit is barred by res judicata is this: is the plaintiff in the 2nd suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which had been adjudicated upon? If so, the plea of res judicata applies not only to the point upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."*

13. When the ruling in the earlier application by the 3rd respondent was delivered, she didn't go on appeal. Instead, about two months after the delivery of the ruling, she came to court yet again with the application now been objected to, asking for the same prayers that were rejected in the earlier application. I agree with the Exparte Applicant. One only needs to look at prayers 1,2 and 3 in both applications. They are all substantially similar. The prayers in the latter application seek to achieve the same objective that similar prayers in the earlier application did not achieve.

14. It is dis-ingenious for the 3rd respondent to purport that the latter application is totally different. The application is broadly the same as the earlier one. When she mentions certificate of costs and bill of costs in the second application, these are the same documents she mentioned in the earlier application and the manner she seeks to have them treated in the latter application is the same manner she wanted them treated in the earlier application. In the same way, she is asking for a restraining order in the latter application. The same restraining order had been asked for in exactly the same terms in the earlier application.

15. And if, for the sake of argument, the issues raised in the latter application are new, one is bound to ask why they were not raised in the earlier application. The general theme of both applications is about costs. So, what is new in the latter application that could not have been raised in the earlier application? Whichever way one looks at it, *res judicata* applies. And I am saying it applies because what is sought in the latter application had been sought and denied in the earlier application. And if it was not sought, it should have been. Either way, *res judicata* applies. It is not enough to tweak a new suit or application and purport it to be different in order to avoid the doctrine of res judicata. The eye of the law is keen. The mind of the law is discerning. And the reason informing the interpretation of the law is deep, wide, even penetrating. Cosmetic changes meant to disguise will not help. In this matter, I hold, without equivocating, that the objection as raised is well merited. I therefore uphold it and proceed, as asked, to strike out the application dated 28th August, 2019. The application is hereby struck out with costs to the Exparte Applicant.

Dated, signed and delivered at Kericho this 20th day of May, 2020.

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A. K. KANIARU

JUDGE