



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
LAND & ENVIRONMENT CASE NO. 86 OF 2012 (OS)

GRACE KAMENE M'BERECE.....PLAINTIFF

VERSUS

JOYCE RIGIRI W/O DAVID MBOGORI.....1ST DEFENDANT

JOHN MBOGORI.....2ND DEFENDANT

RULING

The Notice of Preliminary objection herein is dated 29th November, 2012 and was filed by the defendants

It seeks orders-:

1. **THAT this court lacks jurisdiction to hear and determine this suit on the ground that the same is res-judicata pursuant to section 7 of the Civil Procedure Act, Cap 21, Laws of Kenya.**

2. **THAT further proceedings of this suit be stayed until the determination of this Preliminary Objection herein.**

3. **COSTS be provided for.**

Counsel for the defendants, during the hearing of the Preliminary Objection, stated that he, Inter alia, based his objection on section 7 of the Civil procedure Act. He averred that issues in this suit had previously been determined by a Court of competent jurisdiction and that Court's decision was made on merit. According to him the decision in Meru Central Land District Tribunal in Case No. 54 of 2000 was finally brought to the Chief Magistrate's Court as LDT 24/2002 and pronounced in accordance with the

law. He stated that what was directly and substantially in issue in the LDT and what is actually in issue in the present suit was land numbers Nyaki/Giaki-Kiburune/ 671, 672 and 673.

He told the Court that the parties before the LDT were Joyce Rigiri Mbogori versus Kamene M'Berece and the parties in this suit are Grace Kamene M'Berece versus Joyce Rigiri and John Mbogori.

He further argued that as there was no appeal or review preferred against the decision of the tribunal, the present suit was a disguised appeal for which this Court had no jurisdiction. He contended that litigation must end and opined that the kind of circus brought about by the suit herein should not be countenanced by the Court. This was the *raison d'etre* of section 7 of the Civil Procedure Act and hence *res judicata*.

Counsel for the Plaintiff opposed the Preliminary Objection and described it as lacking merit. According to him the Preliminary Objection does not raise purely matters of law as it raises some issues of facts which need ascertainment by way of evidence. He gave the example of the parcels of land in dispute and said that they needed to be ascertained. He further argued that *Res Judicata* was a matter of pleadings which could only be raised at the trial of the main suit.

He argued that the present suit relates to parcel numbers Nyaki/Giaki-Kiburine 671, 672 and 673 which are not mentioned in the tribunal proceedings. Hence, according to him, the matters in issue in this suit were not in issue in LDT 54 of 2000.

He continued to aver that as the plaintiff's claim in this suit is one of adverse possession, it did not feature in the LDT Case. He stated that even had it been an issue in the LDT case, the LDT would not have been competent to handle the same as by virtue of section 38 of the Limitation of Actions Act, adverse possession claims can only be heard by the High Court. He further stated that the LDT exceeded its jurisdiction as it decided an issue relating to ownership of land for which it had no jurisdiction.

Counsel for the plaintiff urged the Court to consider the authorities he had provided and dismiss the Preliminary Objection.

Counsel for the defendants reiterated his earlier submissions but added that the competence of the LDT should not be raised at this stage as no appeal or review proceedings had been initiated by the plaintiff. He urged that the suit herein be struck out with costs to the defendants.

I have carefully considered the positions taken by the two sides. Among other things, I note that the LDT case had two parties whereas the present suit has 3 parties. I also note that some issues of facts are apparent although some aspects tilt towards being *res judicata*.

I feel that in this matter justice will be done by allowing the suit to proceed to full hearing. I therefore dismiss the Notice of Preliminary Objection dated 29th November, 2012 with costs to the plaintiff.

It is so ordered.

Written and Signed at Meru this 6th day of May, 2013.

P. M. NJOROGE

JUDGE

DATED, READ AND DELIVERED IN Open court at Meru this 8th day of May 2013 in the presence of:

P. M. NJOROGI

JUDGE