



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

Civil Case 187 of 2009

LIVINGSTONE N. ORINA.....PLAINTIFF/APPLICANT

-VERSUS-

JOSPEH A. NYABUYA.....DEFENDANT/RESPONDENT

R U L I N G

It would appear not to be in dispute that in 2007 the respondent instituted a complaint at the Rigoma Division Land Disputes Tribunal seeking parcel no. *East Kitutu/Botabori/11/1664*, which was then registered in the names of the late Salome Bosibori Nyabuya who was his mother and one of the wives of the applicant. The Tribunal agreed with him and ordered the land to be transferred to him. The deceased had died in 1992 and there was apparently no succession cause filed in the matter. The award was sent to the Senior Resident Magistrate Court at Keroka where it was adopted a judgment of the court and decree issued. On 14/10/2009 the respondent was registered as the proprietor of the land.

The applicant states that the Tribunal had no jurisdiction to entertain a claim touching on title to land, and that it could not entertain a claim in respect of land whose proprietor was dead. He claims the land was his but registered in the name of the deceased who was his first wife. He sought a declaration that the Tribunal's verdict and its subsequent adoption were null and void. He also asked that an injunction does issue against the respondent, and those acting under him, restraining the interference with the land.

With the suit was filed an application under *Order 39 rules 1 and 2 and sections 3A and 63(e) of the Civil Procedure Act and section 128 of the Registered Land Act* for a temporary injunction pending the determination of the suit, and also for an inhibition as alternative prayer

The application was opposed by the respondent whose case was that the issue in relation to the land was settled by the Tribunal and the Keroka court and that, in any case, the applicant's case has been overtaken by events since he is now the registered owner of the land. To the claim by the applicant that he is the beneficiary of the estate of the deceased the respondent states that he has been on the land since 1980 and on it he has put up permanent houses and has planted tea and other permanent crops.

When the application came for hearing the respondent through his advocate Mr. Bwonwonga raised a preliminary objection to the entire suit saying that the matter was *res judicata*; that the same suit was heard between the parties and determined by the Tribunal and cannot be revisited. Counsel submitted that if the applicant was not satisfied with the decision of the Tribunal he ought to have appealed to the Appeals Committee, or gone to the High Court for judicial review.

Mr. Gisemba's position was that the point that was being raised was not a point of law. In any case,

counsel went on, their case was that the Tribunal had no jurisdiction to handle the dispute.

There can be no doubt that *res judicata* is a legal issue. The party relying on it must show that the same dispute between the parties has been heard and determined by a competent court or tribunal. The annexed Tribunal proceedings show the parties to have been the respondent (as complainant) and the applicant (as defendant). However, the land they were discussing belonged to the deceased, and none of the parties had inherited the deceased to be a competent party. The applicant is saying that the tribunal could not have competently dealt with the matter on account of jurisdiction. The respondent claims the case is closed, competence of the Tribunal notwithstanding. The court would like to be addressed on these quite serious and competing arguments. For the time being, the objection is not sustained but the respondent shall be at liberty to pursue the argument. In view of this I ask that costs do abide the application.

Dated, signed and delivered at Kisii this 4th day of November, 2009.

A.O.MUCHELULE

JUDGE

4/11/2009

Before A.O.Muchelule-Judge

Mongare court clerk

Mr. Bwonwonga –present

Mr. Miyianda for Mr. Gisemba

Court: Ruling in open court.

A.O.MUCHELULE

JUDGE

4/11/2009