



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL CASE NO 322 OF 1992**

**MOSES ONDIEGI OKOTH .....PLAINTIFF**

**VERSUS**

**JONATHAN ORENKO OBIAYO.....DEFENDANT**

**RULING**

This is an application for an order that the suit be struck out on the ground that it is barred by the doctrine of *res judicata*, the Court of Appeal having decided the same matter between the same parties in Civil Appeal No. 146 of 1990.

It is conceded that these very parties were the same parties in the Court of Appeal over a matter which arose in the High Court at Kisumu in HCCC No 138 of 1987. There is no serious dispute that in the earlier case as in the present, the claim is ownership of the land parcel No North Nyakach/ Agoro West/721, and the rectification of the land register.

There, as in the instant case the issue basically were (a) the *locus standi* of the plaintiff and (b) whether a first registration under the Registered Land Act could be rectified, given the provisions of section 143(1) of that Act. These points arose squarely in the previous suit, and the Court of Appeal having decided the first issue against the plaintiff, found it unnecessary to consider the second one.

In law, as the same point arose, in the earlier case, and it is arising again, the doctrine of *res judicata* applies, because under explanation (5) to section 7 of Civil Procedure Act, which is not expressly granted by the decree is, for the purposes of this section, deemed to have been refused. And, by explanation (4) any matter which ought to have been decided in a former suit is deemed to have been in issue and decided.

If that is a correct reading of the provisions on *res judicata* on this aspect, then this is a correct reading of the section.

This suit is barred. It is struck out and dismissed on the ground of *res judicata*.

The plaintiff shall pay the costs of the suit of the application.

I so order.

**Dated and delivered at kisumu this 6th day of July 1995**

**R.C.N KULOBA**

**JUDGE**