



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

ENVIRONMENT AND LAND COURT

ENVIRONMENT AND LAND CASE NO. 143 OF 2014

RT REV. DR. ZAKAYO ITEBA EPUSI.....PLAINTIFF

VERSUS

JUSTUS ETYANG ORODI ALIAS ETYANG OKACHO.....DEFENDANT

R U L I N G

1. This is a ruling on the Preliminary Objection raised vide the Notice dated 15th February 2018 and filed on 7th March 2018. The objection is raised by the Defendant – **JUSTUS ETYANG ORODI** – on the grounds that the suit is res judicata as the issue of ownership of the suit properties namely **LR NO. NORTH TESO/KOCHOLIA/1949** and **1950** was already determined in **BUSIA CMCC CASE NO. 10 OF 2007**.

2. Parties opted to argue their positions by way of written submissions. The Defendant’s submissions were filed on 7th June 2019. It was submitted that the Amagoro Land Tribunal dealt with the case involving the properties in 1999. Consequently, an order was made and adopted by the Chief Magistrates’ Court directing that the titles of the suit properties be cancelled and that the Defendant be recorded as the registered proprietor. Counsel for the Defendant contended that the adoption of the Tribunal’s decision amounted to the same being conclusively heard and determined within the meaning of the provisions of Section 7 of the Civil Procedure Act, which bar the re-trial of cases that have already been determined by a Court of competent jurisdiction. Counsel further quoted the cases of **Mwangi Stephen Muriithi Vs Daniel T. Arap Moi & Another (2017) eKLR** and **Mary Nyongesa Aloka Vs Lazarus Sirengo Mukoyani (2018) eKLR** in support of the objection.

3. The Plaintiff’s submissions in opposition to the objection were filed on 12th June 2019. Counsel for the Plaintiff outlined the essentials of the Application of the Doctrine of *res judicata* as pronounced in the case of **Kenya Commercial Bank Ltd Vs Benjoh Amalgamated Ltd (2017) eKLR**; which are that the matter directly and substantially in issue in the current suit must have been directly and substantially in issue in the former suit; the former suit must have been between the same parties or parties claiming under them; parties must have been litigating under the same title; the matter must have been decided before a court competent to try it and the matter must have been heard and finally decided by the Court in the first suit.

4. Counsel for the Plaintiff argued that the case before the Land Disputes Tribunal was a claim based on Teso Customary Law to which the Plaintiff was never a party hence he cannot be bound by the resultant orders affecting his proprietary rights. The case did not deal with the issues at hand relating to the validity of the titles of the suit properties. Further, by filing a counter claim which is in essence a cross-suit, the Defendant’s objection contradicted his expressed intention to obtain reliefs vide the counterclaim. Counsel for the Plaintiff also contended that the Land Disputes Tribunal did not have powers to determine land ownership. Therefore, in as much as its orders were adopted by the Magistrates’ Court their purported action to do so and order cancellation of titles was in excess of its powers and void *ab initio*. The matter was therefore not handled by a Court competent to do so. Moreover, an appeal was preferred to the Provincial Appeals’ Committee which was disbanded before the matter was concluded upon the repeal of the Land Disputes Tribunal Act. Transitional provisions indicated that such proceedings be taken over by the Environment and Land Courts hence the appellate machinery was not exhausted. Counsel for the Plaintiff urged the Court to dismiss the objection.

5. I have read the parties pleadings, submissions and the applicable law. The celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd [1960] EA 696** aptly quoted by Counsel for the Plaintiff defines a preliminary objection as:

“.....a pure point of law which is argued on the assumption that all the facts argued by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion....”

6. From a plain reading of the parties’ pleadings, it is evident that the preliminary objection raised is not a “pure point of law” as it raises

further opposing facts that can only be illuminated by way of evidence at a full trial. The Plaintiff dated 17th July 2014 states that the dispute before the Tribunal was a boundary dispute which was decided in the Defendant's favour to which an appeal was preferred but not concluded. The Plaintiff seeks eviction orders as well as a permanent injunction restraining the Defendant from interfering with the suit properties to which he claims to be the registered proprietor. Further, documents in support of his case include the Titles to the Properties registered in his name in the years 1998 and 1999. The orders upon which the Defendant bases his objection were issued in 2007.

7. In his Defence and Counterclaim filed on 7th March 2018, the Defendant raises issues of land ownership and states that he is the sole proprietor of the mother title pre-subdivision namely **NORTH TESO/KOCHOLIA/1939**. He contends that the subdivision and transfer of the suit properties was fraudulent and claims *inter alia* vacant possession of the properties and Kshs.17,800 for damage to his crops by the Plaintiff. In as much as the Defendant gave notice of his impending preliminary objection, by raising a counter claim delving extensively into issues of land ownership; he submitted to the Courts jurisdiction to determine his cross-suit. He therefore cannot turn around and claim that the same Court lacks jurisdiction to entertain the case.

8. The issue dealt with the Tribunal is unclear as we have not had the benefit of reading their proceedings regarding the suit properties as well as the resultant decision. However, I am in agreement with the Plaintiff that if indeed the Land Disputes Tribunal dealt with any issue on land ownership, its decisions and orders were null and void. The Tribunal derived its jurisdiction from the now repealed LAND DISPUTES TRIBUNAL'S ACT (Act No.18 of 1990). Its mandate stipulated in Section 3(1) of that Act, was to decide on:

- a. Division of, or determination of boundaries to Land, including Land held in common.
- b. A claim to work or occupy.
- c. Trespass to land.

9. From the above, it is clear that the tribunal had no competence or jurisdiction to handle the issue of ownership. Section 7 of Civil Procedure Act (cap 21) forbids handling of a suit which is similar to a suit previously handled and decided by a court competent to handle it. The tribunal lacked competence to decide on ownership hence the doctrine of *Res Judicata* does not apply to this case.

10. The upshot of the foregoing is that the Preliminary Objection dated 15th February 2018 is hereby dismissed. Costs in the cause.

Dated, signed and delivered at Busia this 11th day of September, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff: Absent

Defendant: Absent

Counsel of the Plaintiff: Present

Counsel of the Defendant: Absent

CA: Nelson Odame