



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC 40 OF 2017

(FORMERLY NAKURU ELC 318 OF 2012)

JANE WAIRIMU WAGARA.....1st PLAINTIFF

TABITHA NYOKABI WAGARA.....2nd PLAINTIFF

VERSUS

MARY WANGUI KARANJA.....DEFENDANT

RULING

1. The Plaintiff s by a plaint dated 4th July 2012 and filed in court on the 10th July 2012 instituted the instant suit against the Defendant whereby they sought for declaratory orders that they were the sole absolute registered proprietors of land parcel number Nyandarua/Kitiri/5137, 5138 and 5139. They also sought for declaratory orders that the Decree issued in Nyahururu Principal Magistrate's Court land dispute case number 15 of 2008 in relation Nyandarua/Kitiri/215 is incapable of being enforced and or executed against them in relation to Nyandarua/Kitiri/5137, 5138 and 5139. Finally they sought for permanent injunctive orders restraining the Defendants from interfering with the said parcels of land.
2. Parties complied with the provisions of Order 11 of the Civil Procedure Rules, however when the mater came up for fresh hearing counsel for the Defendant informed the court that they had filed Notice of Preliminary Objection wherein they sought for the Plaintiff 's suit to be struck out.
3. By consent, the parties had agreed to have the said application disposed of in the first instance by way of written submissions.
4. I have considered submissions by the Defendant/Applicant on their Notice of Preliminary Objection dated the 10th April 2018 in which they seek to have the Plaintiff s' suit struck and/or dismissed on the grounds that it was Res Judicata and an abuse of the court process. Further it was their submission that the Plaintiff s had approached the court through the wrong forum to the effect that the remedies sought could not be granted in a suit commenced by a plaint.
5. The Defendants relied on the provisions of Section 7 of the Civil Procedure Act which provision applied to cases where the issue in disputes were similar to an issue that was previously in dispute between the same parties when they were litigating under the same title.
6. The gist of their application was that the present suit was Res Judicata in view of the Land Disputes Tribunal case number 050 of 2005 between Karanja Mbugua Karanja and Stanley Wagara Kariuki where the dispute touched on land parcel No. Nyandarua/Kitiri/214 which was registered in the name of Karanja Mbugua Karanja the Defendant's husband and parcel No Nyandarua/Kitiri/215.
7. That the verdict to the said dispute was read on the 4th September 2007, where the award was adopted as the judgment of the court and a Decree issued on the 29th of June 2011. An attempt by the Plaintiff to set aside the award aside vide an application dated 16th February 2012 was unsuccessful as the application was dismissed on the 24th April 2014.
8. The Plaintiff's husband Stanley Wagara Kariuki did not appeal against the tribunal award or file an application for Judicial Review to quash the decision as per the provisions of Section 8 of the now repealed Land Disputes Tribunal Act.
9. Having failed to explore the available avenues, the Plaintiff s have now filed the present suit seeking that they be declared the sole and absolute registered proprietors of the suit property which had been decided to belong to the Defendant's deceased husband by the tribunal. The Plaintiff s' action was in fact seeking an appeal through the back door.
10. The Plaintiff s have also sought for a declaration challenging the legality of the Tribunal's award. The Decree which was issued by a

competent court cannot be set aside or overturned through a declaration sought by way of a plaint. The Plaintiff s had the option of either filing an Appeal or an application for Certiorari under the provisions of Order 53 of the Civil Procedure Rules.

11. The Tribunal's award cannot be quashed through a civil suit commenced by way of a plaint. The declaration sought is misconceived and the claim was brought through the wrong forum. The Defendant relied on the celebrated **Court of Appeal (sitting at Nairobi) case No. 92 of 1992, Speaker of the National Assembly vs James Njenga Karume.**

12. The application was opposed by the Plaintiff s in their submissions filed on the 29th May 2019 where they also considered when a matter is said to be Res Judicata to submit that the subject suit lands being Nyandarua/Kitiri/5137, 5138 and 5139 were not a subject matter both in the tribunal proceedings and the subsequent award the same having been registered on the 31st August 2010.

13. That at the time of the adoption of the award on 28th June 2011, both the original parcels of land No. Nyandarua/Kitiri/214 and 215 had ceased to exist, their titles having been closed upon subdivision on 18th June 2008 and 4th January 1991 respectively. Both at the time of hearing of the dispute at the tribunal, as well as at time of adoption of the award, the parcels of land were not the same, the original titles having been closed upon sub-division.

14. That the present suit was precipitated by the action of the Defendant attempting to execute a Decree relating to parcels of land No. Nyandarua/Kitiri/214 and 215 against the Plaintiff s parcels of land No Nyandarua/Kitiri/5137, 5138 and 5139 which Decree could not be executed or implemented against their parcels of land which were not the subject matter of the Decree.

15. Further it was the Plaintiff s' submission that the parties are not litigating under the same title as above outlined and noted in the proceedings in the lower court. The parties in the dispute were Karanja Mbugua Karanja and Stanley Wagara Kariuki.

16. That the award was forwarded to the Magistrate in Principle Magistrate Court Land Dispute No. 15 of 2008 via an application by way of Notice of Motion dated the 8th July 2008, filed by Karanja Mbugua Karanja which application was not prosecuted. The Plaintiff s' husband Stanley Wagara Kariuki subsequently passed away on the 2nd July 2008.

17. That on 23rd June 2011, a chamber summons dated 23rd June 2011 was filed by the Defendant seeking for the adoption of the Tribunal's award dated 4th September 2007 as the judgment of the court. By this time her husband Karanja Mbugua Karanja had since died. There was no substitution of either the Plaintiff or the Defendant's husband. In fact the matter against the Plaintiff s' husband Stanley Wagara Kariuki in the Notice of Motion dated the 8th July 2008 had since abated. By the time the award was being adopted on the 28th June 2011, there were no parties before it relating to the dispute before the tribunal.

18. Further the issues were not finally decided in the previous suit by a court of competent jurisdiction. The issues and prayers raised and sought in the present suit respectively, were not addressed by the tribunal or by the lower Court while adopting the award.

19. The claim by the Defendant that the issues in the lower court were fully canvassed was not true as an application to enjoin the Plaintiff s in the proceedings therein was dismissed, the claim for Res Judicata cannot stand.

20. Having found that the award had already been issued and a Decree issued albeit irregularly and illegally, the Plaintiff's only recourse was to seek for a declaration that the said Decree cannot be executed as against them and their parcels of land which were not subject of the Decree.

21. The Constitution enjoins the court to dispense justice without undue regard to procedural technicalities. The submission that the Plaintiff ought to have moved the court by way of judicial review appeal or by way of Petition were mere technicalities. The Plaintiffs should not be shut out to access to justice just because they had moved the court by way of a declaratory suit.

22. The preliminary objection raised is not the only on matters of law but involve matters of fact too which can only be determined at a trial.

Analyses and determination

23. A Preliminary Objection according to the decided case by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd -v- West End Distributors Limited (1969) EA. 696** was stated to be thus:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

24. In this proceedings, it is the Defendant/Applicant's case inter alia that this suit should be dismissed with costs as the same was Res Judicata by virtue of the proceedings in the Nyahururu PMCC Land Dispute No. 15 of 2008.

25. The substantive law on *Res Judicata* is found in Section 7 of the Civil Procedure Act Cap 21 which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has

been heard and finally decided by such court”

26. The test in determining whether a matter is *Res Judicata* as stated was summarized in **Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others (2010) eKLR**, as follows that:

27. The matter in issue is identical in both suits;

- i. The parties in the suit are the same;
- ii. Sameness of the title/claim;
- iii. Concurrence of jurisdiction; and
- iv. Finality of the previous decision.

28. The facts surrounding the proceedings in the Nyahururu PMCC Land Dispute No. 15 of 2008 are that on the 1st November 2005 there was a hearing instituted at the North Kinangop Land Disputes Tribunal No. 050 of 2005 between the claimant/Defendant Karanja Mbugua Karanja of land parcel No. Nyandarua/Kitiri/215 and the objector/Plaintiff Stanley Wagara Kariuki of land parcel No Nyandarua/Kitiri/214 which dispute was moved by Karanja Mbugua Karanja.

29. On the 4th September 2007 the Land Disputes Tribunal made a finding to the effect that the objector Stanley Wagara Kariuki had settled his second wife on the disputed land which he had acquired through a private surveyor he had employed. The ruling was to the effect that ;

- i. The objector vacates and transfers the acquired land portion to the claimant Karanja Mbugua Karanja after collecting his harvest.
- ii. The tribunal also requested the district surveyor Nyandarua to revisit the land in dispute survey and mark the boundaries for the parties to fence.
- iii. The District Land Registrar do amend the map and issue the title deeds accordingly.
- iv. That the Executive Officer, Principle Magistrates Court to sign the necessary documents to facilitate the land transactions.
- v. The objector to meet the cost of the suit and any other that may arise
- vi. Parties were informed of their right to Appeal within 30 days from the date of the ruling

30. Following the finding by the tribunal, and before the adoption of the award, the objector, Stanley Wagara Kariuki, subdivided land parcel No Nyandarua/Kitiri/214 on the 18th June 2008 to create parcels No. Nyandarua/Kitiri/5137, 5138 and 5139 which were registered in the names of the Plaintiff herein

31. Subsequently on 8th July 2008, Karanja Mbugua Karanja had filed a Miscellaneous Application No. 15 of 2008 at the Principle Magistrates Court- Nyahururu to have the Tribunal’s award adopted as a Judgment of the Court, in terms of the provisions of the Land Disputes Tribunal Act (now repealed).

32. Sadly, on the 2nd July 2008, the objector Stanley Wagara Kariuki passed away wherein on the 19th August when the application to adopt the award came up for hearing, none of the parties were in court and the matter was stood over generally.

33. On the 28th June 2011 the court purported to adopt the award of 4th September 2007 and issued a decree dated the 29th June 2011, pursuant to an application dated the 23rd June 2011 filed by one Mary Wangui Karanja, on behalf on her deceased husband Karanja Mbugua Karanja, the claimant. At the time, the said Mary Wangui Karanja had no locus standi in that she had not been substituted for the deceased claimant/Plaintiff. A further anomaly was that the said affidavit had been sworn by the deceased whereas the jurat had been sworn by one Rael Wangechi Njoroge.

34. Vide an application dated the 16th February 2012, the Plaintiff herein sought to be enjoined in the suit seeking to have the said order be reviewed while citing the fact that the Defendant herein had concealed material facts to obtain the decree issued on the 29th June 2011.

35. In her ruling dated the 4th April 2014, the learned trial Magistrate dismissed the application stating that not only had the Applicants in the present application lacked the locus Standi to file the application, but that the court had adopted the award of the tribunal as per the provisions of Section 7(1) and (2) of the repealed Land Disputes Tribunal Act.

36. From the above narration the issues that come out for determination are:

- i. Whether the Land Dispute tribunal was a competent court
- ii. Whether the parties in the suit are the same

iii. Whether there was sameness of the title/claim

37. Section 3 (1) of the Land Disputes Tribunals Act Cap 303A (now repealed) limited the jurisdiction of land disputes Tribunals as follows;

a). the division of, or the determination of boundaries to land, including land held in common;

(b). a claim to occupy or work land; or

(c). trespass to land

38. Clearly from the award issued by the Land Tribunal, it emerges that the same touched on title of a registered land. The Act did not confer to the Land Disputes Tribunal, jurisdiction to determine disputes over title or ownership of land. The Land dispute tribunal therefore acted in excess of jurisdiction when it purported to order the objector to vacate and transfers the acquired land portion to the claimant Karanja Mbugua Karanja, direct District Land Registrar to amend the map and issue the title deeds accordingly and the Executive Officer Principle Magistrates Court to sign the necessary documents to facilitate the land transactions, a power that is a preserve of the High Court.

39. In the case of **SIR ALI BIN SALIM VS. SHARIFF MOHAMED SHATRY CIVIL APPEAL NO. 29 1940** it was stated that; -

“If a Court has no jurisdiction over the subject matter of the litigation, its judgments and orders however precisely certain and technically correct are mere nullities and not only voidable; they are void and have no effect either as estoppel or otherwise and may not only be set aside at any time by the Court in which they are rendered, but be declared void by every Court in which they may be presented. It is well established law that jurisdiction cannot be conferred on a Court by consent of parties and any waiver on their part cannot make up for the lack or defect of jurisdiction”.

40. It therefore follows that the decision by the Land Disputes Tribunal therein was in total disregard to its limits of jurisdiction in law and therefore was not a court of competent jurisdiction in the circumstance. I proceed to hold that the plea of Res Judicata must fail as against the decision of the tribunal in the former suit.

41. On the Second and third issues as to whether the parties and the title/claim in the suit are the same, I find that, it is not in dispute that the claimant’s claim against the objector before the Land Disputes Tribunal was to assert his right of ownership to land parcel No. Nyandarua/Kitiri/215. It is also not in dispute that both the objector and the claimant in the matter before the tribunal passed away and that before the objector died, he had sub divided land No. Nyandarua/Kitiri/214 giving rise to parcels No. Nyandarua/Kitiri/5137, 5138 and 5139. That the said parcels of land were registered to the Plaintiff s herein.

42. I therefore find that the Plaintiff s, by filing the present case were litigating not as legal representatives of their deceased husband, the objector in the Tribunal Proceedings, but in their capacity as proprietors of the suit land which in this case was not the subject matter of the suit before the Tribunal. Further, the orders sought in the present suit are orders that the Tribunal had no jurisdiction to issue. I therefore find that the matter before court is not Res judicata. The Preliminary objection dated 10th April 2019 is herein dismissed with costs to the Plaintiff.

Dated and delivered at Nyahururu this 22nd day of October 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE