REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 433 OF 2013

MILKA WAMBUI NDABA.....1ST PLAINTIFF

SOLOMON MUKONYO NDABA.....2ND PLAINTIFF

VERSUS

JOSPHAT KINYANJUI MUKONYO.....1ST DEFENDANT

DAVID MBUGUA MUKONYO.....2nd DEFENDANT

JOSEPH NDABA MUKONYO.....3RD DEFENDANT

JUDGMENT

By their plaint filed originally at the High Court in Embu on 13th February 2009, the plaintiffs sought judgment against the defendants in the following terms:

> ***1. A permanent injunction restraining the defendants either by themselves, their agents, servants and/or employees from entering into rice holding No. 1643 Mwea Irrigation Scheme or otherwise interfering with in any other way whatsoever with the plaintiffs' possession, use and occupation of the same.***
>
> ***2. A declaration that the plaintiffs are the lawful licencees and tenants of the said rice holding No. 1643.***
>
> ***3. Costs of this suit.***
>
> ***4. Any other or further relief that the Court may deem fit and just to grant.***

The basis of the plaintiffs claim is that at all material time from 15th June 1993, the 1st plaintiff was appointed as guardian of her minor son **SOLOMON MUKONYO** as the owner of the rice holding No. 1643 and was issued with all the relevant documents of ownership thereof. However, on or about the year 2000, the 1st and 2nd defendants without any colour of right instituted an illegal case in the Land Disputes Tribunal against the 3rd defendant over the rice holding No. 1643. The said Tribunal then filed its award in Court. The plaintiffs aver that the defendants knowingly and unlawfully mis-guided the Court which then sub-divided the rice holding through the Manager Mwea Irrigation Scheme without the consent of the plaintiffs. It is the plaintiffs' case that the defendants, through fraud, are now mis-using the rice holding illegally hence this suit.

The 1st and 2nd defendants filed a joint defence in which they pleaded that they rightly and legally instituted proceedings in the Land Disputes Tribunal whose award was adopted as the judgment of the Court vide **WANGURU COURT ARBITRATION CASE No. 7 of 2000**. That the plaintiffs preferred an appeal against that award via **CENTRAL PROVINCIAL LAND DISPUTES APPEAL COMMITTEE CASE No. 182 of 2000** which up-held the Tribunal's award. A further appeal was filed via **NYERI HIGH COURT CIVIL APPEAL No. 149 of 2003**. Although it is not pleaded in the defence, the record shows that the appeal No. 149 of 2003 was withdrawn before **M.S.A MAKHANDIA J**. (as he then was) on 19th September 2007 with costs. The defendants aver that they are the registered licencees of rice holdings No. 1643 A and measuring 1½ acres and No. 1643 B measuring 1½ acres respectively and have been utilizing the same. The defendants plead further that this suit is res-judicata in view of the decision made in the Appeals Committee Case No. 182 of 2000 and Nyeri High Court Civil Appeal No. 149 of 2003.

The 3rd defendant did not file any defence and on 2nd December 2015, the plaintiffs withdrew the case against him and he testified as their

witness.

The 1st plaintiff **MILKA WAMBUI NDABA** (PW1) told the Court that the 2nd plaintiff is her son while the 1st and 2nd defendants are her brothers-in-law. She stated that she is the holder of the licence for the rice holdng No. 1643 at the Unit M of the Mwea Section which was originally in the names of her husband the 3rd defendant (who testified as PW2 after the case against him was withdrawn). That in 1993, the licence to the said rice holding was taken from the 3rd defendant. She requested that the licence to the said rice holding be transferred to her and the application was allowed. She started utilizing the rice holding from 1993 upto 2000 when she discovered that the 1st and 2nd defendants had gone to Court and had the rice holding shared between them following orders issued in **WANGURU CASE No. 7 of 2000** to which she was not a party. She therefore consulted an advocate who filed an appeal without her instructions. She then filed this suit.

JOSEPH NDABA MUKONYO (PW2) was the 3rd defendant in this case before the suit against him was withdrawn. He confirmed that the 1st plaintiff is his wife and the 2nd plaintiff their son while the 1st and 2nd defendants are his brothers. His evidence was that from 1971 to 1993, he was the registered licensee of the rice holding No. 1643 which was however terminated and given to the 1st plaintiff to hold in trust for their son the 2nd plaintiff. Then in 2000, the 1st and 2nd defendants sued him in the **WANGURU CASE No. 7 of 2000** and each of them was given 1½ acres out of the rice holding which was then in the names of the 1st plaintiff.

DAVID MBUGUA MUKONYO (the 2nd defendant) was the only witness for the defence and asked the Court to adopt his written statement as his evidence. In that statement which is dated 31st October 2013, he has stated that the rice holding No. 1643 no longer exists having been sub-divided into three (3) portions and that he and the 1st defendant are the registered licencees of rice holding No. 1643 A and 1643 B each measuring 1½ acres while the plaintiffs are the registered licencees of rice holding No. 1643 C measuring 2 acres. That the said sub-division was done following orders issued in **WANGURU ARBITRATION CASE No. 7 of 2000.** That the plaintiffs filed an appeal against those orders in **NYERI HIGH COURT CIVIL APPEAL No. 149 of 2003** but later withdrew the same. That it is not true that he instituted an illegal case and in any case, the plaintiffs had an opportunity to challenge the award through an appeal which they later withdrew. Therefore, the award of the Tribunal and the judgment in the **WANGURU ARBITRATION CASE No. 7 of 2000** are lawful and each of the parties has taken possession of their respective portions which they utilize. Finally, that this suit is res-judicata as this dispute has been litigated before in the **WANGURU COURT** and **NYERI HIGH COURT** and should therefore be dismissed with costs.

Submissions have been filed both by **Mr. A.P. KARIITHI ADVOCATE** for the plaintiffs and **Mr. P.M. KAHIGA ADVOCATE** for the defendants.

I have considered the evidence by both parties and the submissions by counsel.

The defendants have pleaded, and their counsel **Mr. KAHIGA** has also submitted that this suit is res-judicata in view of the previous suits over the rice holding No. 1643 situated at the Mwea Irrigation Settlement Scheme. That issue goes to the jurisdiction of this Court and ought to be determined at the earliest opportunity.

Res-judicata is provided for in ***Section 7 of the Civil Procedure Act*** as follows:

> ***"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"***. Emphasis added

From the above, the ingredients of res-judicata are:

> ***1. That the issue in dispute in the former suit between the parties must directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar;***
>
> ***2. that the former suit should be between the same parties or parties under whom they or any of them claim litigating under the same title.***
>
> ***3. that the suit was heard and finally determined.***
>
> ***4. that the Court that heard the suit was a competent Court***.

For a plea of res-judicata to be successfully raised therefore, it is important that the previous suit was heard and determined by a Court of competent jurisdiction. In ***MULLA, THE CODE OF CIVIL PROCEDURE 18TH EDITION at Page 285***, the authors state:

> ***"A judgment delivered by a Court not competent to deliver it cannot operate as res-judicata since such judgment is not of any effect. It is a well settled position in law that if a decision has been rendered between the same parties by a Court which had no jurisdiction to entertain and decide the suit it does not operate as res-judicata between the same parties in subsequent proceedings".***

It is clear from the record herein that the dispute over the ownership of the rice holding No. 1643 was first heard by the Land Disputes Tribunal at **WANGURU** which made an award sub-dividing it between the parties as follows:

1. JOSPHAT KINYANJUI - 1 ½ acres

2. DAVID MBUGUA - 1 ½ acres

3. SOLOMON MUKONYO under the guardianship of

MILKA NDUBA - 2 acres

Arising out of that award, the rice holding was sub-divided into three (3) portions being 1643 A, 1643 B and 1643 C. That award was confirmed by the Court at **WANGURU in ARBITRATION CASE No. 7 of 2000** and an appeal at the **PROVINCIAL LANDS DISPUTES APPEAL COMMITTEE** by the plaintiffs was dismissed on 19th October 2000. The plaintiffs then filed **NYERI HIGH COURT CIVIL APPEAL No. 149 of 2003** which they however withdrew on 19th September 2007.

The bottom line however is that the Tribunal that determined the dispute between the parties, and which was exercising its jurisdiction under the provisions of the now ***repealed Land Disputes Tribunal Act,*** had no jurisdiction to determine a dispute concerning ownership of the rice holding No. 1643 situated at the Mwea Irrigation Settlement Scheme. The jurisdiction of the Tribunal as provided under ***Section 3 (1) of the repealed Land Disputes Tribunal Act*** was restricted to disputes involving:

(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".

By the time the dispute was being determined by the Tribunal, the licencee of rice holding No. 1643 Mwea Irrigation Settlement Scheme was the 2nd plaintiff under the guardianship of the 1st plaintiff. It is common knowledge that land in the Irrigation Scheme belongs to the National Irrigation Board and the Tribunal had no jurisdiction to interfere with the plaintiff's licence and therefore, in deciding to partition the rice holding No. 1643 into three (3) portions without even any reference to the National Irrigation Board, the Tribunal clearly exceeded its jurisdiction. In any case, under the ***Irrigation (National Irrigation Schemes) Regulations***, a dependant is defined in relation to the licencee as the ***"….. father and mother, wives and such of his children as are unmarried and under the age of eighteen years …."*** The defendants do not fall in any of these categories.

My finding therefore is that the Tribunal had no jurisdiction to make the orders that it did with respect to the rice holding No. 1643 because it was not competent to do so which is a requirement for res-judicata to apply. In the circumstances, the suit is not barred by the principle of res-judicata. I will therefore determine it on its merits.

Looking at the plaint herein, and counsel for the defendants has rightly submitted as much, the plaintiffs appear to be challenging the award of the Tribunal. In paragraph nine (9) of the plaint, it is pleaded as follows:

"That the plaintiffs aver that the defendants knowingly and unlawfully mis-guided the Court to make orders thus making the Manager Mwea Irrigation Scheme to sub-divide the said rice holding unlawfully even without the consent of the plaintiffs".

If the plaintiffs were minded to challenge the award of the Tribunal and its adoption as an order of the Court and subsequently the dismissal of their appeal at the Appeals Committee, the proper route to take was to file an appeal at the High Court. Indeed that is what the plaintiffs did by filing **NYERI HIGH COURT CIVIL APPEAL No. 149 of 2003** which they however withdrew on 19th September 2007. It is not clear why they withdrew that appeal which was the best way of challenging the Tribunal's award. The other alternative would have been to file for Judicial Review to have that award quashed. The other option that the plaintiffs had was to challenge the decision of the Tribunal through a normal suit such as this one. In the case of ***JOHANA NYAKWOYO BUTI VS WALTER RASUGU OMARIBA & OTHERS C.A CIVIL APPEAL No. 182 of 2006*****,** the Court of Appeal held that a decision of the Tribunal can be challenged through a normal suit or a declaratory suit even after the same has been adopted as a judgment of the Court. However, that is not what is before this Court. Although the plaintiffs appear to be challenging the Tribunal's award, that is not what is before this Court going by the remedies sought and which I have indicated above. For instance, in paragraph ten (10) of the plaint, the plaintiffs alleges fraud but no particulars have been itemized to prove the said fraud. In paragraph eleven (11), the plaintiffs also plead that the defendants should desist "***from their illegal acts***". I am not sure that the defendants' presence on the rice holding following an order of a Court can properly be described as ***"illegal"*** before such an order has been declared so by a competent Court and that is what the plaintiffs ought to have pursued by prosecuting their appeal which, unfortunately, they abandoned. It is also clear that rice holding No. 1643 Mwea Settlement Scheme no longer exists the same having been partitioned way back in 2009 and all the parties given their respective portions and licences. There can be no basis upon which this Court can, in the circumstances, permanently injunct the defendants from utilizing their respective portions as sought by the plaintiffs.

The up-shot of the above is that the plaintiffs' suit is dismissed. As the parties are family, each shall meet their own costs.

B.N. OLAO

JUDGE

7TH MAY, 2018

Judgment dated and signed at Bungoma this 7th day of May 2018.

To be delivered at Kerugoya on notice.

Ruling read and Signed on 26th June 2018

S.N.MUKUNYA

JUDGE

26TH JUNE, 2018