REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 122 OF 2014

NDUNDA MIANO.....PLAINTIFF

VERSUS

MUGO RIAKATHARI.....DEFENDANT

RULING

NDUNDA MIANO (the plaintiff herein) filed this suit against the defendant (**MUGO RIAKATHARI**) seeking the following orders:

> *1. **A declaration that the award of WANGURU LAND DISPUTES TRIBUNAL and which was adopted as a judgment of the Court in WANGURU ARBITRATION CASE No. 4 of 2005 was irregular, null and void ab initio for lack of jurisdiction.***
>
> *2. **An order, pursuant to Article 165 (7) of the Constitution 2010, to call for the proceedings and award of the WANGURU LAND DISPUTES TRIBUNAL (the Tribunal) and subsequent order of WANGURU LAW COURT adopting the award as judgment of the Court in WANGURU ARBITRATION CASE No. 4 of 2005 and for an order setting aside the said award and order adopting the award as judgment of the Court.***
>
> *3. **Costs of this suit with interest.***

The suit is based on the pleading that at all material times, the plaintiff was the registered owner of land parcel No. MWEA/TEBERE/B/26 (the suit land herein) and sometimes in 1965 **NGUTI MUGO,** then a minor, filed **NAIROBI HIGH COURT CIVIL CASE No. 95 of 1965** through his father the defendant herein seeking orders for the rectification of the title. The suit was dismissed on 15th December 1976 but the following year, the defendant filed an Originating Summons being **NAIROBI HIGH COURT CIVIL CASE No. 220 of 1997** (O.S) seeking orders that he be registered as the absolute proprietor of the suit land instead of the plaintiff. That case was dismissed on 27th October 1988 and a notice of appeal filed but no appeal has been filed to-date. In 2005, the defendant filed a reference before the **MWEA LAND DISPUTES TRIBUNAL** against the plaintiff seeking the same orders that had been dismissed by the High Court in Nairobi to wit, the registration of the suit land in the names of the defendant instead of the plaintiff. The Tribunal which had no jurisdiction to deal with issues pertaining to title to land proceeded to overrule the decision of the High Court and gave an award for the cancellation of title which was in the names of the plaintiff herein and another title to issue in the names of the defendant. That award was adopted as a judgment of the Court in **WANGURU ARBITRATION CASE No. 4 of 2005** on 26th April 2005. The plaintiff therefore pleads irregularity on the part of the Tribunal in that it had no jurisdiction to determine issues relating to title to land in view of ***Section 3 (1) of the Land Disputes***

Tribunal Act (now repealed) and this Court has power to declare such award null and void.

The defendant filed a defence in which he pleaded, inter alia, that the plaintiff has never been the registered proprietor of the suit land. The defendant pleaded further that there is still pending at this Court **KERUGOYA ELC CASE No. 194 of 2013 and also KERUGOYA ELC CASE No. 77 of 2014**. All the other averments by the plaintiff were denied.

On 17th August 2016 the defendant filed a Notice of Preliminary Objection on a point of law that this suit is Res-judicata. That Preliminary Objection is the subject of this ruling.

It was agreed by counsel for the parties that the Preliminary Objection be canvassed by way of written submissions which have been filed both by **MOMANYI GICHUKI** advocate for the defendant and **MAINA KAGIO** advocate for the plaintiff.

This Preliminary Objection is premised on the pleading that this suit is res-judicata. The principle of res-judicata is provided for in ***Section 7 of the Civil Procedure Act*** in the following terms:

> "***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".***

It is clear from the above that before a plea of res-judicata can be up-held, the following must be proved:

> *1.* ***The issue in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine of res-judicata is pleaded***
>
> *2.* ***The former suit must be between the same parties or those under whom they or any of them claim litigating under the same title***
>
> *3.* ***The former suit must have been heard and finally decided***
>
> *4.* ***The Court or Tribunal which determined the former suit must have been a competent Court or Tribunal.***

See ***KARIA & ANOTHER VS ATTORNEY GENERAL 2005 1 E.A 83***.

The main rational behind the doctrine of res-judicata is based on the public interest that there should be an end to litigation. Parties must therefore be protected from being vexed with repetitive litigation over the same issues that have previously been determined by a competent Court or Tribunal. In raising the plea of res-judicata, the defendant has pleaded in paragraph

nine (9) of his defence that the following cases are pending:

> 1. **KERUGOYA ELC APPEAL CASE No. 194 of 2013**
>
> 2. **KERUGOYA ELC CASE No. 77 of 2014.**

In his submissions, counsel for the defendant also makes reference to another Judicial Review Application at Embu but particulars thereof have not been availed nor the pleadings annexed. It is the responsibility of a party pleading res-judicata to avail for the Court's perusal all the previous pleadings so that the Court can peruse them in order to arrive at a decision whether that plea has been properly raised. This Court can therefore only refer to the above two cases because they were filed at this Court and are available in the registry. Counsel must however be cautioned that it is their duty and that of their clients to place before the Court all the evidence that they wish the Court to rely on. It is not the responsibility of

the Court to fish for that evidence in its registries. ***Section 109 of the Evidence Act*** provides as follows:

> ***"The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person"***

I shall therefore consider whether infact this suit is res-judicata in view of the above cases mentioned above.

With regard to **KERUGOYA ELC APPEAL No. 194 of 2013,** the appeal is not pending but was determined by this Court vide a judgment delivered on 4th November 2013 and related to an appeal from the judgment of a magistrate who had adopted as a decree of the Court, an award by the **MWEA LAND DISPUTES TRIBUNAL**. In dismissing the appeal, this Court held inter alia, that, once a decision of the **MWEA LAND DISPUTES TRIBUNAL** was filed in Court, the Magistrate had no discretion other than to adopt that award in terms of the provisions of ***Section 7 (2) of the repealed Land Disputes Tribunal Act of 1990***. What is sought by the plaintiff herein is a declaration that the award of the **WANGURU LAND DISPUTES TRIBUNAL CASE No. 4 of 2005** (this is the same award referred to in **KERUGOYA ELC APPEAL CASE No. 194 of 2013)** was irregular null and void for want of jurisdiction. That was not in issue in **KERUGOYA ELC APPELA CASE No. 194 of 2013** and could not have been an issue in that appeal because under the repealed ***Land Disputes Tribunal Act***, an appeal from the decision of a Tribunal lay to the Appeals Committee and thereafter, to the High Court. What this Court has to determine in these proceedings is the juridical mandate of the Land Disputes Tribunal exercising its powers under the repealed Land Disputes Tribunal Act and that can only be done through a Judicial Review application or by filing a plaint as the plaintiff has now done. It is clear therefore that the issues raised and determined in **KERUGOYA ELC APPEAL No. 193 OF 2014** and those being raised in this suit are not similar and could not have been raised in the same appeal.

With regard to **KERUGOYA ELC CASE No. 77 of 2014**, the dispute involves the cancellation of titles No. MWEA/TEBERE/4070, 4071 and 4072 being sub-divisions of land parcel No. MWEA/TEBERE/26 and also an order for permanent injunction to restrain the defendants, their agents, servants, employees or any person acting under their instruction from entering the said parcels of land. The jurisdiction of the **WANGURU LAND DISPUTES TRIBUNAL** is not an issue in **KERUGOYA ELC CASE No. 77 of 2014** and therefore that case cannot be cited to plead res-judicata.

It is clear from the above that the issue concerning the jurisdiction of the **WANGURU LAND DISPUTES TRIBUNAL** to make the orders that it did in its case No. 4 of 2005 was neither "***directly and substantially in issue***" in **KERUGOYA ELC APPEAL No. 194 of 2013 or KERUGOYA ELC CASE No. 77 of 2014** nor was that issue "***heard and finally decided***" by the Courts in those previous cases. Res-judicata cannot therefore be properly up-held on account of those cases.

The up-shot of the above is that the defendant's Preliminary Objection pleading res-judicata is without merit. It is accordingly dismissed with costs to the plaintiff.

B.N. OLAO

JUDGE

19TH MAY, 2017

Ruling dated, delivered and signed in open Court this 19th day of May 2017

Mr. Muchira for Mr. Kagio for the Plaintiff - present

Mr. Momanyi for the Defendant - absent

Defendant however present in person.

B.N. OLAO

JUDGE

19TH MAY, 2017