



REPUBLIC OF KENYA

IN THE E.L.C. COURT OF KENYA AT EMBU

E.L.C NO. 111 OF 2014

NYAGA MUINDI.....PLAINTIFF

VERSUS

JAMES KIRANGI NGARI (*Sued as the administrator*

of the estate of **NGARE MURUKA.....DEFENDANT**

RULING

1. By a plaint dated 21st March 2013 and filed in court on 27th March 2013, the Plaintiff sought the following orders:

a. A declaration that the Mbeere Land Disputes Tribunal award is null and void and land parcel No. EVURORE/NGUTHI/750 do revert to the Plaintiff.

b. Costs and interest.

2. It is pleaded in paragraph 5 of the plaint that during the land adjudication process the suit property, Title No. EVURORE/NGUTHI/750 was given to one Ngare Muruka the Defendant's father but when the Plaintiff appealed the decision to the Minister, the appeal was allowed and the property reverted to the Plaintiff. The Plaintiff further pleads in paragraph 7 that it is that decision which the Land Disputes Tribunal overturned by awarding the land to the Defendant once again. The Plaintiff contended that the said Tribunal had no jurisdiction to entertain the claim or to award the suit property to the Defendant because the appeal to the Minister was final under the law.

3. The Defendant filed a statement of defence dated 26th June 2013 in which it was denied that a case was filed at the Tribunal on the suit property. It was further pleaded that there was a previous suit being Embu PMCC No. 266 of 1992 on the same subject matter which conclusively determined the dispute the subject of the suit.

4. The Defendant also stated in the said defence that if the Plaintiff was aggrieved by the decision in the said case, he ought to have appealed or filed judicial review proceedings. The Defendant, therefore, alerted the Plaintiff vide paragraph 9 of the defence that he shall raise a preliminary objection to the entire suit on the basis that it was *res judicata*.

5. According to the record, when the parties' advocates appeared before Hon. Justice Boaz Olao on 11th March 2016, they agreed to dispose of the preliminary objection by way of written submissions. It would appear from the record that the Plaintiff filed his submissions on 18th August 2016 whereas the Defendant filed his on 31st March 2017.

6. The Defendant submitted that subject matter of the current suit is the same as the subject matter in Embu PMCC No 266 of 1992 i.e. Title No. *EVURORE/NGUTHI/750*. It was also submitted that although the Plaintiff's father was the Plaintiff in the earlier suit, the current Plaintiff, who is his son, was also joined as party thereto as shown by the court order annexed to the Defendant's list of documents. It was further submitted that judgement in the said suit was entered on the basis of the award of the Mbeere Land Disputes Tribunal and or the Provincial Land Appeals Committee which had ruled in favour of the Defendant's father.

7. It was further submitted that the Plaintiff never appealed against the decision of the Provincial Appeals Committee within 60 days as required by law nor was there any appeal against the decree in Embu PMCC No. 266 of 1992. The Defendant's counsel, therefore, urged the court to hold that the instant suit is *res judicata* and to hold that litigation on the matter had come to a conclusive end.

8. The Plaintiff opposed the Preliminary Objection and submitted first, that the parties in PMCC 662 of 1992 and the ones in the current suit are different. Second, it was submitted that the causes of action are different in the two suits. Third, it was submitted that the Land Disputes Tribunal and the Provincial Appeals Committee had no jurisdiction to handle the matter.

9. I have considered the rival submissions of the parties. The purpose of the doctrine of *res judicata* is to prevent issues which have been litigated conclusively from being reintroduced and re-litigated in another forum. The object of the doctrine is to bring such litigation to an end. In the case of *Nicholas Njeru Vs Attorney General & 8 Others [2013] eKLR*, it was stated that;

“The doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and that the individual should not be harassed twice with the same litigation (see Mulla, the Code of Civil Procedure, 16th Edition Vol 1 P. 161)...”

10. In the said case, the Court of Appeal summarized the requirements of *res judicata* as follows;

a. The matter must be directly and substantially in issue in the two suits.

b. The parties must be the same or parties under whom they claim, litigating under the same title.

c. The matter must have been finally decided in the previous suit.

11. Similar requirements were reiterated in the earlier case of *Uhuru Highway Development Ltd v. Central Bank of Kenya & 2 Others – NBI Civil Appeal No. 36 of 1996.*

12. The basis for the application of the doctrine of *res judicata* in Kenya is *section 7 of the Civil Procedure Act (Cap 21)* and, of course, *the Judicature Act.* The material parts of *section 7* provide 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 one 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.”

13. In my view, the instant suit meets the elements for the application of the doctrine of *res judicata*. The subject matter in both suits is the same. The only variation in the parties relates to the inclusion of the personal representatives of parties who have died in the past. The representatives can only be deemed to be claiming under the persons whose estates they are representing. The fact that a cause of action can be dissected or contrived in various forms or renditions does not detract from the fact that the nature of the dispute and the subject matter is substantially the same. I am also of the view that the previous suit was conclusively decided by the Magistrates Court subject, of course, to the right of appeal available to the

parties.

14. The Plaintiff has submitted that decisions of the Land Disputes Tribunal and the Eastern Provincial Appeals Committee were made without jurisdiction hence the declaration sought in the instant suit. The court is not persuaded that a party who is aggrieved by a decision of a Tribunal or Appeals Committee whose decisions are appealable or amenable to judicial review is entitled to file a fresh suit in the first instance. There existed a statutory framework for challenging such decisions in our legal system. The Plaintiff or (his father) could have appealed or applied for judicial review of those decisions. The Plaintiff could equally have taken the same measures with respect to the decree of the Magistrate's Court in Embu CMCC No 662 of 1992.

15. On the authority of the case of ***Florence Nyaboke Machani Vs Mogere Amosi Ombui & 2 Others [2014] eKLR***, I do not think that commencement of fresh proceedings for a declaration is tenable in law. In that case, the Appellant had filed a suit for various reliefs including a declaration that the award and decision of the Land Disputes Tribunal was a nullity for want of jurisdiction. The Appellant had neither undertaken any judicial review or appeal proceedings against the award of the Tribunal or decree of the subordinate court but chose to file a fresh suit. The High Court dismissed the Plaintiff's suit who appealed the decision to the Court of Appeal. The Court of Appeal dismissed the appeal.

16. The Court of Appeal in the said appeal agreed fully with the High Court judgement and stated that;

“The appellant in this appeal did not challenge the decision of the tribunal in accordance with the said procedure set out in the Act. Neither were judicial review proceedings taken to quash the award. The appellant instead chose to file a suit for declaratory orders and compensation...”

17. The High Court Makhandia J (as he then was) held as follows on the adoption of the tribunal's award by the Magistrate's Court;

“Once the award of Borabu Land Disputes Tribunal was adopted as a judgement of Senior Resident Magistrate's Court at Keroka, it ceased to exist on its own. It cannot be the subject of a declaration...”

Elsewhere in the judgement the High Court held that;

“It is trite law that a valid judgement of a court unless overturned by an appellate court remains a judgement of the court and enforceable, the issue of jurisdiction notwithstanding. The Plaintiff had all the avenues to impugn the award as well as the judgment. He did nothing.”

18. The upshot of the foregoing is that the Defendant's preliminary objection has merit and the same is hereby allowed. Consequently, the Plaintiff's suit is hereby struck out with costs to the Defendant.

19. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **28th** day of **JUNE 2017**.

In the presence of Ms Thungu for Plaintiff and Ms Muriuki holding brief for Mr Kathungu for the Defendant.

Court clerk Njue/Leadys.

Y.M. ANGIMA

JUDGE

28.06.18