



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 580 OF 2008

GEOFFREY NGANGA NJURIBA.....
PLAINTIFF

VERSUS

THE ATTORNEY GENERAL1ST
DEFENDANT

ESTHER MUMBI MBURU (Administrator Of The Estate Of Mburu Njuguna).....2ND
DEFENDANT

RULING

Coming up before me for determination is the Preliminary Objection dated 18th March 2015 and filed on 19th March 2015 by the 2nd Defendant to the effect that this suit is *res judicata* for the following reasons:

- (1) That the dispute was adjudicated by the Lands Dispute Tribunal at Githunguri in 2006 which ruled in favour of the 2nd Defendant and informed the Plaintiff of his right of appeal but the Plaintiff did not appeal.
- (2) That after adjudication by the Tribunal its decision was thereafter adopted by the Magistrates Law Court sitting at Githunguri on 28th November 2006.
- (3) That the Plaintiff fully participated in the above proceedings.
- (4) That this suit has been brought to this court in clear disregard of the above proceedings and ruling and is an abuse of the due process of court.

Both the 2nd Defendant and the Plaintiff filed their respective written submissions.

The issue the court is called upon to determine is whether or not this suit is *res judicata*. The spirit and object of the doctrine of *res judicata* is succinctly expressed in a well-known common law maxim “*debet bis vexari pro una etadem causa* (no one ought to be twice vexed for one and the same cause)”. The law pertaining to the doctrine of *res judicata* is captured under **Section 7** of the **Civil Procedure Act** which provides 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.”

Having raised this Preliminary Objection, the onus was upon the 2nd Defendant to demonstrate that there had been a former suit between the same parties in a court competent to try such suit in which the same issues raised herein had been heard and finally decided by such court. According to the 2nd Defendant, there was a former suit between the two parties namely **Tribunal Case No. 1 of 2007 Githunguri** in which the issue of ownership of the parcel of land known as Githunguri/Ikinu/477 (herein referred to as the “suit property”) was heard and determined. It is the assertion of the 2nd Defendant that in addition, the parties in that previous suit were the same as in the present suit and therefore this suit should be declared *res judicata*. The 2nd Defendant’s argument is that the suit property has already been subdivided according to the decision of the Tribunal and the Certificate of Title rectified accordingly.

The Plaintiff on his part does not deny that there was indeed the case before the Tribunal being **Tribunal Case No. 1 of 2007 Githunguri** where the 2nd Defendant obtained orders to subdivide the suit property. He asserted that he was neither served with the tribunal papers or claim nor summoned to appear before the Tribunal as required in law. He confirmed that this notwithstanding, the award of that Tribunal was indeed read and adopted as an order of the court ordering the subdivision of the suit property between him and the 2nd Defendant. In his written submissions dated 22nd July 2015 and filed on 23rd July 2015, the Plaintiff argues that the said Tribunal was not a competent court to hear and determine the issue of ownership of the suit property and therefore this suit is not *res judicata*.

This Preliminary Objection therefore turns on the question whether the Land Disputes Tribunal which heard and determined **Tribunal Case No. 1 of 2007 Githunguri** was competent to hear and determine the issue of ownership of the suit property as between the Plaintiff and the 2nd Defendant as it did. **The Land Dispute Tribunal Act (now repealed) at section 3(1)** is the one which gave the Tribunal jurisdiction to hear and determine land disputes as follows:

(1) “Subject to this Act, all cases of a civil nature involving a dispute as to-

- (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.”**

The issue of ownership of the suit property clearly does not fall within the confines of the provisions of **section 3(1)** of the now repealed **Land Disputes Tribunal Act**. I agree with the decision of the court in **Vincent Kipsongok Rotich versus Orpah Jelagat Ngelechei (2014) eKLR** where it was held as follows:

“It has however been argued that this suit cannot be res judicata since the land disputes tribunal did not have jurisdiction to try the case. A careful reading of section 7 of the Civil Procedure Act Cap 21 will reveal that for res judicata to apply, the matter in court must have previously been tried in a court competent to try the matter. It appears therefore that if the dispute was determined by a court without jurisdiction, the doctrine of res judicata will not apply.”

I further agree with the further finding in the same case to the following effect:

“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, does not operate as *res judicata* between the same parties in subsequent proceedings... It will be seen that the jurisdiction of the tribunal was restricted to hearing disputes touching on the determination of boundaries, claims to occupy or work land, or claims of trespass to land. It is not within the mandate of the tribunal to hear disputes touching on ownership of land. The decision of the tribunal touched on ownership of land. The decision may not have been nullified but it is no doubt one of the issues in this suit. I have no doubt in my mind that the Land dispute tribunal, in the circumstances of this case, delved into a matter in which it had no jurisdiction. That decision was rendered by a court that was not a “competent court” and the decision and all subsequent proceedings are *prima facie* a nullity. This subsequent suit having been filed in a court of competent jurisdiction cannot be *res judicata*.”

This decision falls on all fours to the present suit. It is my finding that the Land Disputes Tribunal in Githunguri was not a “competent court” for purposes of determining the issue of the ownership of the suit property which issue has been presented to this court for determination. That being the position, the defence of *res judicata* is not available in the circumstances and the Preliminary Objection raised by the 2nd Defendant is hereby dismissed. Costs in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF JULY 2016.

MARY M. GITUMBI

JUDGE