



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**  
**AT NYERI**  
**ELC NO.208 OF 2014**  
**JEREMIAH NDUNG’U KAMUTU.....PLAINTIFF**  
**VERSUS**  
**BENARD MWANGI KAMUTU.....DEFENDANT**  
**RULING**

**Introduction**

1. This ruling is in respect of the defendant’s notice of preliminary objection dated **17th February, 2015** and filed on **23rd February, 2015**. In the notice of preliminary objection herein, the defendant contends that the suit herein is *res judicata* Nanyuki SRMCC Land Case No.34 of 2007.
2. The preliminary objection was disposed of by way of written submissions.

**Submissions filed by the applicant**

3. In the submissions filed on behalf of the defendant, reference is made to the pleadings filed in this suit and in particular to an averment in the defendant’s statement of defence to the effect that there exists a judgment and decree issued in Nanyuki SRMCC Land Case No.34 of 2007 between the parties in this suit. It is contended that the judgment and decree obtained in that suit have never been set aside.
4. It is pointed out that in execution of the decree issued in Nanyuki SRMCC Land Case No. 34 of 2007 (*supra*), the defendant filed a suit for eviction of the plaintiff which suit is pending hearing and final determination.
5. Reference is made to **Section 7** of the Civil Procedure Act which prohibits a court from trying any suit or issue which has been substantially dealt with involving the same parties litigating under the same title in a court competent to try such subsequent suit and which suit has been heard and finally determined by such court. It is argued that the current suit offends the above cited provisions of the law and the issues raised in the current suit are said to have been directly and substantially dealt with in Nanyuki SRMCC Land Case No. 34 of 2007.
6. In support of the defendant's contention, reliance is made on the following documents:-
  - i. Decree dated 5th October, 2007;
  - ii. Ruling dated 17th October, 2014; and

iii. Nairobi Civil appeal No. 41 of 1980-**Kibogy vs. Chemweno.**

### **Submissions filed by the respondent**

7. In the submissions filed on behalf of the plaintiff/respondent, it is pointed out that the decision of the Ngarua Land Dispute Tribunal which is the subject matter of the judgment and decree referred to in the defendant's submissions, was appealed from and reversed by the requisite Provincial Appeals Committee. Therefore, the decision of the Land Disputes Tribunal having been reversed upon appeal, ceased to exist and any order and or decree emanating therefrom is null and void.

8. It is admitted that the defendant filed Nanyuki CMCCC No.115 of 2012 seeking eviction of the plaintiff from the suit property and that that suit is still pending.

9. With regard to the contention that the current suit is *res judicata* the Nanyuki Land Case No. 34 of 2007, it is submitted that the award of the appeal has never been decided upon and a final judgment entered on merit and that upon repeal of the Land Disputes Tribunals Act by the Environment and Land Court Act, all matters that were pending before the Provincial Appeal Committee had to be filed at the Environment and Land Court for determination. In addition to the foregoing submissions, it is submitted that the tribunal lacked jurisdiction to arbitrate over registered land.

### **Analysis and determination**

10. As pointed above, **Section 7** of the Civil Procedure Act, Cap 21 Laws of Kenya prohibits a court from trying any suit or issue which has been directly and substantially dealt with in a former suit involving the same parties, litigating under the same title in a court competent to try such subsequent suit and which suit has been heard and determined.

11. The test in determining whether a matter is *res judicata* was summarised in the case of **Benard Mugo Ndegwa -VS- James Nderitu Githae and 2 Others (2010) eKLR**, as follows that: 1) The matter in issue is identical in both suits; 2) the parties in the suit are the same; 3) sameness of the title/claim; 4) concurrence of jurisdiction; and 5) finality of the previous decision.

12. In applying the foregoing test to the circumstances of this case, I begin by pointing out that whereas it is not in dispute that a judgment and a decree were obtained in Nanyuki SRMC's Land Case No. 34 of 2007, that judgment and decree were issued pursuant to the award of the Ngarua Land Disputes Tribunal. In the case before the Tribunal, the defendant had prayed for cancellation of the title issued in respect of Plot No. Git/Muhotetu Block 2/1029.

13. Under **Section 7** of the Land Disputes Tribunals Act, No. 18 of 1990, the jurisdiction of the lower court was merely to enter judgment in accordance with the decision of the tribunal. It was not part of its mandate to enquire into legality or otherwise of the decision of the tribunal. The decision was not of that court but of the tribunal.

14. In view of the foregoing, the question to ask is whether the tribunal had jurisdiction to hear and determine the matter brought before it. This question is pertinent because under **Section 7** of the Civil Procedure Act, a matter is not *res judicata* if the former suit was heard by a court or tribunal which did not have jurisdiction. In this regard see the case of **Vincent Kipsongok Rotich v. Orphah Jelagat Ngetich (2014) e KLR** where **Munyao J.**, stated:-

**“It is apparent from a reading of Section 7 of the Civil Procedure Act that *res judicata* will not apply where the former suit was heard by a court or tribunal which did not have jurisdiction...”**

15. On whether the tribunal had jurisdiction to hear and determine the dispute that forms the basis of the preliminary objection herein, I adopt the decision in the case of **Mateo Githua Ngurukie vs. Hon. Attorney General and 5 Others; Nyeri High Court Civil Suit No. 206 of 1999** where **Ombayo J.**,

stated:-

**“Over and again the Court of Appeal and High Court have held that the Land Dispute Tribunal lacks jurisdiction over registered land especially where the matter at hand touches on title of land. (See Wachira wambugu Case (*supra*) and Julius Mburu Mbuthia case, *supra*). It follows therefore that the instant issues are not *Res judicata* due to the fact that they were deliberated upon and determined by an incompetent tribunal that lacked jurisdiction over the same..**

**In the case of Vincent Kipsongok Rotich v. Orphah Jelangat Ngelechei (2014)e KLR *supra*, the learned judge Munyao J., declined to declare the suit therein *res judicata* despite the existing decision/order that had been made by the LDT and adopted by the Hon. Magistrates Court.”**

16. In the decision of **Munyao J.** under reference, in dismissing the preliminary objection before him the judge stated:-

**“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*. For the above reasons, I decline to declare this suit as being *res judicata*.”**

17. Being of the view that the position adopted by my brothers on this matter reflects the right legal position concerning the matter, and noting that the Land Disputes Tribunal did not have jurisdiction to order the cancellation of the title to the suit property, I decline to declare the current suit *res judicata* for the same reasons.

18. The upshot of the foregoing is that the notice of preliminary objection herein has no merit and is dismissed.

19. Costs in cause.

**Dated, signed and delivered at Nyeri this 26<sup>th</sup> Day of May, 2015.**

**L N WAITHAKA**

**JUDGE**

**In the presence of:**

Mrs Muhoro for the Plaintiff/Applicant

N/A for the Defendants/Respondents

Court Assistant - Lydia