REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 543 OF 2012

Formerly HCC No 124 of 2009

VINCENT KIPSONGOK ROTICH.....PLAINTIFF

VS

ORPHAH JELAGAT NGELECHEI.....DEFENDANT

(Res Judicata; application seeking to have suit struck out inter alia because it is res judicata; dispute having previously been determined by the Land Disputes Tribunal; tribunal having awarded land to the defendant; plaintiff filing this suit seeking the same land that was in issue before the tribunal; whether suit res judicata; ingredients of res judicata; requirement for previous suit to have been determined by a court of competent jurisdiction; whether the tribunal had jurisdiction to determine the dispute; held that on the face of it tribunal did not have jurisdiction to determine the dispute and was therefore not a competent court and this case cannot therefore be said to be res judicata; application dismissed with costs)

RULING

1. The application before me is that dated 10 October 2013 filed by the defendant. The main prayer in the application is for an order that this suit be struck out for the reason that it is *res judicata*. The application is supported by the affidavit of the defendant and is opposed by the plaintiff.

2. Let me provide a little background on this suit.

3. This suit was commenced by way of plaint filed on 13 July 2009. The plaintiff in his plaint pleaded that he is the legal and registered owner of the land parcel Nandi/Kamobo/4106 (the suit land) measuring 0.48 hectares. It is pleaded that by an agreement in writing of 5/08/2000 the plaintiff offered for sale to the defendant 0.2 of an acre of the suit land and the defendant agreed to buy the same at an agreed purchase price of Kshs. 100,000/=. It is stated that the defendant paid a sum of Kshs. 50,000/= leaving a balance of Kshs. 50,000/= which has not been paid. The plaintiff has pleaded that it was a condition of the agreement that at least a sum of Kshs. 60,000/= will need to be paid before the defendant took possession of the land that she was buying. It is also stated that the consent of the Land Control Board had not been obtained thus making the entire agreement null and void. It is averred that the defendant forcefully entered the suit land and took possession of the 0.2 acres which the plaintiff has claimed to be illegal. In his plaint the plaintiff has sought for a declaration that he is the legal owner of the whole of the suit land, an order of eviction, permanent injunction and costs.

4. The defendant upon service of summons filed a defence and counterclaim. In her defence, she has averred that she is a purchaser for value of 0.2 acres of the suit land. She has averred that the purchase price was not Kshs. 100,000/= but Kshs. 60,000/=, which she has claimed to have paid in full, after which

she took possession on 5 January 2002. She has stated that the agreement was made on 5 August 2002 and not 5 August 2000 as alleged by the plaintiff. She has also pleaded that consent of the land control board was obtained and the land has been sub-divided with new parcel numbers having been issued. She has averred that the portion in dispute is now registered as Nandi/Kamobo/4464. She has denied any breach of the agreement. In the defence she put down that there is a pending case being Kapsabet PMLDT Case No. 45 of 2007, with another party over the same subject matter. In the counterclaim, the defendant has asked for an order of specific performance to compel the plaintiff to execute the transfer documents and to surrender the original title to the suit land so that the mutation over the suit land may be registered. She has also asked for an order of permanent injunction against the plaintiff over the portion of 0.2 acres.

5. Pursuant to an application dated 26 November 2010, the plaintiff filed an application seeking a stay of proceedings of Kapsabet PMLDT Case No. 45 of 2007. The reason for the application were inter alia that the defendant was proceeding to execute the decree in the said case seeking the transfer of the 0.2 acres to her. It would appear that the Kapsabet matter was before the Magistrate so that the defendant could get the benefit of an award made by the Land Disputes Tribunal in her favour, in which she was awarded 0.2 acres of the suit land. The application for stay of proceedings was heard by my brother Azangalala J (as he then was) who proceeded to allow it vide a ruling delivered on 18 January 2011.

6. In her affidavit in support of the application, the defendant has deponed that the Nandi District Land Disputes Tribunal made an award in her favour, which award was adopted by the Principal Magistrate Kapsabet, on 9 October 2007, thus becoming a judgement of the court. She annexed the proceedings of the land disputes tribunal and the proceedings of the Kapsabet Principal Magistrates Court. The applicant has deponed that no appeal was lodged to the Provincial Appeals Tribunal and no application for judicial review was made to quash the decision. She has contended that this suit must fail, as there is a decree in force, regarding the same parties and touching on the same subject matter. She has averred that she has since obtained title to her portion of land which is now Nandi/Kamobo/4464 and she annexed a certificate of official search. She has averred that the plaintiff is not challenging her new title thus this suit is frivolous.

7. In his replying affidavit, the plaintiff has averred that the proceedings of the Land Disputes Tribunal were a nullity from the word go as the tribunal did not have jurisdiction. It is contended that the proceedings herein cannot be *res judicata* since the proceedings of the land disputes tribunal are a nullity. It is averred that the superior court can make declaratory orders declaring such proceedings illegal and a nullity, which jurisdiction, is not ousted by a failure to file an appeal or an application for judicial review. It is averred that no consent of the land control board was obtained and the agreement is therefore a nullity.

8. Mr. Rotich for the applicant relied entirely on his supporting affidavit. Mr. Omusundi for the respondent argued that this suit is not *res judicata* as the plaintiff is not barred from seeking a declaratory order. It was also argued that the parties herein were not the same parties before the tribunal.

9. I have considered the application and the arguments of counsel. It is not in dispute that there was a matter before the Kapsabet Division Land Disputes Tribunal. The same is Tribunal Case No. 14 of 2007. The applicant before the tribunal was the defendant herein and the respondents were the plaintiff and his wife. The case before the tribunal concerned the sale of 0.2 acres of the land parcel Nandi/Kamobo/4106. The applicant alleged to have bought it for Kshs. 60,000/= on 5 August 2002. The respondent (plaintiff herein) resisted the claim of the applicant but failed. The tribunal found that the respondent (plaintiff herein) had sold 0.2 acres of the land but became unco-operative and failed to go before the land control board to give the necessary consent to transfer. The tribunal awarded the applicant (defendant herein) 0.2 acres out of the said land and asked the court to issue an order of sub-division. The award went for adoption before the Principal Magistrate Kapsabet in Kapsabet LDT Case No. 45 of 2007 and the award was adopted on 9 October 2007. It is not in dispute that no appeal was preferred to the Provincial Appeals Tribunal pursuant to the provisions of Section 8 of the Land Disputes Tribunal Act, Act No. 18 of 1990 (now repealed). Neither were any proceedings instituted by way of judicial review, seeking orders to quash the award.

10. In our statutes, the doctrine of *res judicata* is embodied in Section 7 and 8 of the Civil Procedure Act, Chapter 21, Laws of Kenya, which provides as follows :-

S. 7. Res judicata

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.

Explanation. (1)—The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Bar to further suit

S. 8. *Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of that cause of action.*

11. I have no doubt in my mind that the claim before the tribunal is the same claim in this matter. The parties before the tribunal are the same parties herein, save that the wife of the plaintiff, (who was a respondent before the tribunal alongside her husband, the plaintiff) did not sue in these proceedings. I have however no doubt in my mind that this suit has been instituted by the same parties, or parties claiming under the same title, since the wife of the plaintiff herein was asserting the same title being asserted by her husband. It therefore does not matter that the plaintiff's wife did not sue in these proceedings. I find that the parties before the tribunal are the same and the subject matter before the tribunal is the same subject matter in this suit.

12. 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. It will be seen from explanation No. 2 to Section 7, that the competence of a court, shall be determined irrespective of any provision as to right of appeal

from the decision of that court. It follows that a court faced with an application claiming that the suit is *res judicata* is obliged to determine whether the court which heard the former suit was a court of competent jurisdiction. If it was not, then the matter cannot be *res judicata.*

13. I appreciate that this provision of the law may cause confusion, for there could be in existence a decree, which may or may not have been performed, but which has not been set aside, issued in the former suit. Trying the latter matter, without first setting aside the decree in the previous suit, can indeed lead to ambiguity on which decree is to be followed, as there may end up being two conflicting decrees on the same subject matter. The best avenue in my view, is for a party aggrieved by a determination made by an incompetent court, to move to quash that determination or include a prayer seeking to have the former decision declared a nullity in his later suit claiming other remedies, so that there is no risk of having two parallel decrees over the same issue.

13. That said, it is apparent from a reading of S.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. This was indeed one of the holdings in the case of ***Damaris Kondoro vs Gachanja Gitere & Another Nakuru HCCC No. 127 of 2004, (2005) eKLR*** in which Musinga J (as he then was) affirmed that the doctrine of *res judicata* cannot apply where the tribunal in the former suit did not have jurisdiction.

14. A similar decision was reached in the more recent case of ***Mwanaisha Kiriale Mohamed & Another v Alfred Wafua Okuku & 2 Others, Mombasa HCCC No. 129 of 2010, (2014) eKLR***. In this case, a matter with a pecuniary jurisdiction of Kshs. 10 Million was filed and determined in the Mombasa Magistrate's Court. The maximum pecuniary jurisdiction for magistrates at the time the matter was filed was Kshs. 3 Million. A determination was made in favour of the plaintiff in that case. The defendant filed a fresh suit in the High Court (as plaintiff) and the defendant (plaintiff in the Magistrate's Court) raised the plea of *res judicata*. Muriithi J, in an elaborate decision, held that the plea of *res judicata* could not be sustained as the former suit was determined by a court which did not have jurisdiction.

15. This same point has also been applied outside our jurisdiction where provisions similar to our Section 7 of the Civil Procedure Act are in operation. In the American case of ***Lloyd vs American Motor Inns, Inc 343 S.ED.2d 68 (1986)***, the Supreme Court of Virginia stated as follows on the doctrine of *res judicata* and jurisdiction.

It is well settled that a judgment of a court of competent jurisdiction is conclusive respecting the same cause of action in a subsequent suit between the same parties. Corprew v. Corprew, 84 Va. 599, 602, 5 S.E. 798, 799 (1888). *For a prior judgment to preclude a subsequent action, however, the court in the first proceeding must have had jurisdiction over the subject matter of the controversy and the precise issue upon which the judgment was rendered.* Linkous v. Stevens, 116 Va. 898, 906-07, 909-10, 83 S.E. 417, 419-21 (1914); Seamster v. Blackstock, 83 Va. 232, 234, 2 S.E. 36, 37 (1887).

In the present case, the Industrial Commission acted within its authority when it received evidence and determined that Lloyd's accident did not arise out of and in the course of her employment with the Inn. Having made this threshold finding, however, the Commission had no jurisdiction to adjudicate the merits of Lloyd's claim. Therefore, the Commission's finding of no causation was made without jurisdiction and could not bar Lloyd's subsequent action for damages.

16. This position is also affirmed in Mulla, *The Code of Civil Procedure*, 18th Edition at page 285, where it is written as follows :-

" 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."

17. In our instance, the case before the tribunal touched on ownership of a portion of 0.2 acres of the disputed land. The jurisdiction of the land disputes tribunal was provided for by Section 3 of the Land

Disputes Tribunal Act which set down as follows :-

3. *(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,

shall be heard and determined by a Tribunal established under section 4.

18. 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 was 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.

19. A more or less similar scenario, to that before me, emerged in the case of ***Stephen Ntokoiwuan Koikai vs Raphael Lekishon Koikai , Nakuru HCCC No. 111 of 2007 (2007)eKLR***. In the matter, the plaintiff filed suit seeking orders that he is entitled to a land parcel CIS-Mara/Ololunga/3492. The defendant raised a preliminary objection that the suit was *res judicata* as the matter had been adjudicated by the Land Disputes Tribunal and a decree issued which had not been set aside. The court (Kimaru J), did not buy this argument. He held that the tribunal was not a "competent court" whose decision could attract the application of the doctrine of *res judicata* in a subsequent suit.

20. 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.*

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

22. It has further been claimed in the supporting affidavit, that the defendant already has title to her portion of the suit land, described as Nandi/Kamobo/4464 whereas the claim herein does not touch on that land. That may be so, but her title no doubt is suspect and it a title originating from the suit land herein. It was obtained while these proceedings were ongoing.

23. I had mentioned earlier that this court had issued an order of stay of proceedings in the Kapsabet matter. The reason behind the filing of the application for stay of proceedings in this suit, was that there was an application seeking to execute the award of the decree in the Magistrate's Court, so that the suit land could be sub-divided and a new title issued to the defendant. Stay was granted and if it was so granted, I am at a loss as to how the defendant proceeded to obtain title in her own name without prosecuting the application for execution in the Kapsabet matter, which she could not do, owing to the stay of execution issued by this court. There is some strong suspicion in the manner in which the defendant has proceeded to obtain title, and this court cannot shut its eyes to that. An explanation needs to be provided by the defendant which can only be given if this suit proceeds.

24. For the reasons above, I decline to allow this application. I proceed to dismiss it with costs.

25. Before I finish, it will be recalled that I have mentioned the apparent wrongful acquisition of title by the defendant. So that the subject matter of the suit is not lost, I issue an order barring the defendant from selling, leasing, or in any other way encumbering the title Nandi/Kamobo/4464. Pursuant to the powers granted to me by dint of the provisions of Section 68 of the Land Registration Act, Act No. 3 of 2012, I also issue an order of inhibition, inhibiting the registration of any entry in the title of the land parcel Nandi/Kamobo/4464 pending hearing and final determination of this suit. I believe that no prejudice will

be caused to the defendant who will of course have an opportunity to demonstrate that she is properly entitled to that land, and if she succeeds, this order will no doubt be lifted.

It is so ordered

DATED AND DELIVERED AT ELDORET THIS 23RD DAY OF APRIL 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in the presence of:

Miss G.N. Mokua of M/s Onyinkwa & Co Advocates for plaintiff/respondent.

Mr. S.M. Mathari of M/s Wambua Kigamwa & Co Advocates for defendant/applicant