



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 711 OF 2012

JAMES NJUGUNA CHUI.....PLAINTIFF

VERSUS

JOHN NJOGU KIMANI.....DEFENDANT

RULING

The Defendant's Application

This ruling is on an application brought by the Defendant herein by way of a Notice of Motion dated 25th April 2013. The Defendant is seeking to have the Plaint dated 1st October 2012 and filed in court on 16th October 2012 be struck out on the grounds that it is vexatious, an abuse of the process of the Court, and a nullity *ab initio*. The Defendant claims that the suit herein is *res judicata*, and that the issues and parties in the present matter are directly and substantially in issue in former suits of **Kikuyu Land Tribunal LND/16/20/26/2003,- Dr. James Njuguna Chui & Francis Mungai Muiruri v. John Njogu Kimani** and **Provincial Appeals Committee (Tribunal) Claim/Appeal No. 6 of 2004,- Francis Mungai Muiruri v. John Njogu Kimani**.

The Defendant's Advocate, Patricia Khisa, swore a supporting affidavit on the 25th April 2013 wherein she explained that on or about the year 2003, the Plaintiff herein through his agent who had a power of attorney lodged a suit, against the Defendant, herein, before the Kikuyu Land Disputes Tribunal in **LND/16/20/26/2003,- Dr. James Njuguna Chui & Francis Mungai Muiruri v John Njogu Kimani**, in relation to parcels of land Title Number Kikuyu/Kikuyu Block Nos. 1/112; Title Number Kikuyu/Kikuyu Block Nos. 1/113 and Title Number Kikuyu/Kikuyu Block Nos. 1/114. Further, that the basis of the Plaintiff's complaint in the said suit was that the Defendant, being the registered proprietor of Title Number Kikuyu/Kikuyu Block No. 1/114, had trespassed on his land, interfered with the beacons and had encroached onto the Plaintiff's land, being Title Number Kikuyu/Kikuyu Block No. 1/113.

The deponent stated that the Kikuyu Land Disputes Tribunal, exercising its jurisdiction under section 3(1) of the Land Disputes Tribunal Act (now repealed) entertained the suit and made an award. Further, that in the said award the Tribunal determined that "the boundaries between Kikuyu/Kikuyu Block Nos. 1/113 and L.R Kikuyu/Kikuyu Block Nos. 1/114 had not been interfered with, and that the said Award was read and adopted as judgment of the court by virtue of section 7 of Land Disputes Act No. 18 of 1990 (now repealed) on 28th August 2004 in **Kikuyu PMCC Misc. 5 of 2004- Francis Mungai Muiruri v. John Kimani Njogu**. The deponent annexed a copy of the said Award.

The deponent averred that the Plaintiff subsequently lodged an appeal in **Provincial Appeals Committee (Tribunal) Appeal No. 6 of 2004,- Francis Mungai Muiruri v. John Njogu Kimani**. The said Appeals Tribunal exercised its requisite jurisdiction, pursuant to the repealed Lands Disputes Tribunal Act,

entertained the matter and delivered its Award on 26th June 2006. It was the deponent's further averment that on pronouncement of the judgment the awards became valid and enforceable as a valid judgment of a court of competent jurisdiction. Further, that in the circumstances the subject matter and parties in the present suit are the same as in the two former suits that were lodged and litigated upon in the said Lands Tribunals and which were confirmed as valid judgments of the court.

The Plaintiff's Response

The Plaintiff opposed the Defendant's application in Grounds of Objections and of preliminary objection dated 9th May 2013 on the following grounds:

1. That the affidavit in support of the application sworn by Patricia Khisa Advocate offends the Provisions of Order 19 and the general rule that Advocates should not depone to matters of fact in a matter where they are representing a party, the same amounts to nothing but hearsay and is bad in law and that paragraphs 3 – 22 of the said affidavit ought be struck off.
2. That the issue of whether or not the suit is *res judicata* is an issue that should otherwise be addressed during the main hearing of the suit.
3. The doctrine of *res judicata* does not apply herein as no competent Court has tried and determined fully the issues between the parties herein. The Kikuyu Law Court only dealt with an issue of injunction and held that it did not have jurisdiction to deal with the matter, and that the Land Dispute Tribunal did not even have the jurisdiction to deal with the matter.
4. The application is otherwise frivolous, vexatious unmeritorious and ought to be dismissed with costs.

The Submissions

The parties prosecuted the Defendant's application by way of written submissions. The Defendant's counsel filed two sets of submissions dated 19th November 2013 and 18th February 2014, wherein he relied on section 7 of the Civil Procedure Act to argue that the principles of *res judicata* as stated in **Ganatra vs Ganatra (2007) 1 E.A. 76 (HCK)** were applicable in this suit. This is for reasons that the Kikuyu Lands Dispute Tribunal and Provincial Appeals Committee (Tribunal) had the requisite jurisdiction conferred by section 3 (1) of the repealed Lands Disputes Tribunal Act, and their awards were thus made by judicial fora of competent jurisdiction.

Further, that the said awards were adopted as judgments of the court pursuant to section 7(1) of the repealed Land Disputes Tribunal Act. The Defendant also contended that the Plaintiff submitted himself to the jurisdiction of the said Tribunals by instituting the suits therein. The Defendant's counsel relied on the decisions in **Muhia vs Mutura, (1999) 1 EA 209** and **R vs Mary Wambui Kihui & Others ex.p Michael Njuguna Muthoni, Nairobi JR ELC No 75 of 2011** in this respect.

On the issue of the affidavit sworn by Patricia Khisa offending the provisions of Order 19 Rule 3 (1) of the Civil Procedure Rules, the Defendant's counsel submitted that the said affidavit was on matters of law not fact; that the firm of Advocates where the deponent worked represented the Defendant during the proceedings in **Kikuyu PMCC Misc. 5of 2004- Francis Mungai Muiruri v. John Kimani Njogu**; that the sources of the deponents information had been annexed to the affidavit; and lastly that there is nothing in the Civil Procedure Rules that precludes an Advocate from swearing an affidavit in his or her client's case. The counsel relied in the decision in **Pattni vs Ali and Others, (2005) 1 EA 339 (CAK)** in this respect.

The Defendant's counsel filed submissions dated 20th January 2014 and 17th December 2012. He submitted that it was not in dispute that the Plaintiff lodged complaints in the Kikuyu Lands Dispute Tribunal and an appeal at the Provincial Appeals Tribunal, but argued that the suit herein is not as a result *res judicata*. It is the Plaintiff's counsel submission that the Land Disputes Tribunal did not have jurisdiction to deal with the matter in issue as the land that was in dispute were residential plots within Kikuyu municipality yet the repealed Land Disputes Tribunal Act under section 2 only dealt with agricultural not with land within a municipality or township. Therefore, that both the awards of the

tribunals and proceedings of the courts that adopted the tribunal's awards were null and void.

The Plaintiff's counsel further submitted that the suit herein is not *res judicata* as the decision of the tribunals were not decisions of "a court" as required by section 7 of the Civil Procedure Act, and the decision in **Ganatra vs Ganatra (supra)**, and as defined by section 2 of the Civil Procedure Act. Further, that all that the Kikuyu Resident Magistrate's court did was to simply read and adopt the awards by the Land Disputes Tribunal, and never heard the parties, evaluated any facts or wrote any judgment that can be used in an application of the *res judicata* doctrine.

The Issues and Determination

I have read and carefully considered the pleadings, evidence and submissions made herein. There are two issues to be decided, the first is whether the Defendant's supporting affidavit sworn by Patricia Khisa on 25th April 2013 should be struck out. The second issue is whether the suit herein should be struck out for being *res judicata*.

On the first issue, Order 19 Rule 3(1) of the Civil Procedure Rules provides as follows as regards swearing of affidavits:

" (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof."

There is nothing in the said rule that precludes an Advocate from swearing an affidavit in his or her client's case. I have perused the affidavit sworn by Patricia Khisa on 25th April 2013 and note that she relies on proceedings of and awards of the Kikuyu Land Dispute Tribunal and Provincial Land Disputes Appeals Tribunal and orders of court for the facts she has deponed to, which proceedings, award and orders she has attached. She is therefore able to prove the facts she has stated and her affidavit is properly on record.

On the second issue, the law on striking out of pleadings is stated in Order 2 Rule 15 of the Civil Procedure Rules and in various judicial decisions. Order 2 Rule 15(1) provides that:

(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court,

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

The salient principles that apply to striking out of pleadings are that this is a draconian measure to be employed sparingly, and the grounds for striking out must be plain on the face of the pleadings and from the facts alleged by the parties. This was stated by the Court of Appeal in **D.T. Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1 .**

The main ground for striking out the suit that is presented by the Defendant is that the suit herein is *res judicata* and therefore an abuse of the process of the court. Section 7 of the Civil Procedure Act provides

as follows with regard to the doctrine of *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.”

It is not in dispute that the Plaintiff in this suit is raising the same issues and over the same subject matter as those raised in the complaint to the Kikuyu Land Disputes Tribunal and Provincial Land Disputes Appeals Tribunal which were the subject of the decision in the decree issued by the Kikuyu Magistrates Court in Misc. Cause No 8 of 2004. It is also not disputed that the parties in the two suits are the same.

The Plaintiff however claims that the Kikuyu Land Dispute Tribunal and Provincial Land Disputes Appeals Tribunal did not have jurisdiction to hear the dispute herein and that their decisions were not decisions of a court as envisaged by section 7 of the Civil Procedure Act. It is my view that the Plaintiff is estopped from raising the issue of the jurisdiction of the Kikuyu Land Dispute Tribunal and Provincial Land Disputes Appeals Tribunal having been the party who filed the complaint and appeal in the said Tribunals, and having submitted to their jurisdiction. In any event the proper procedure would be to apply to set aside the said awards or appeal the said awards, and not to file a fresh suit while the awards are still subsisting.

On the argument that the said awards were not judgments of a competent court for purposes of the application of section 7 of the Civil Procedure Act, the Defendant brought evidence to show that the award of the Provincial Land Disputes Appeals Tribunal was adopted as judgment of the court by the Kikuyu Principal Magistrate’s Court and a decree to that effect issued on 23rd June 2009 which is attached as annexure “PK3” to the Plaintiff’s supporting affidavit.

The provision for a Land Disputes Tribunal award being adopted as an order of the court was in section 7 of the repealed Land Disputes Tribunal Act which stated as follows:

(1) The chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the magistrate’s court together with any depositions or documents which have been taken or proved before the Tribunal.

(2) The court shall enter judgement in accordance with the decision of the Tribunal and upon judgement being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.

The definition of a decree according to section 2 of the Civil Procedure Act is that it is the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. In addition under section 2 of the Civil Procedure Act, a court is defined to mean the High Court or a subordinate court, acting in the exercise of its civil jurisdiction. The Kikuyu Principal Magistrate’s Court is therefore a competent court within the meaning of the section 7 of the Civil Procedure Act, and by adopting the award of the Provincial Land Disputes Appeals Tribunal and issuing a decree therefrom, gave the said award the enforceability and finality of a court decision.

In addition, there were clear procedures under section 8(9) of the repealed Land Disputes Tribunal Act as to how an award of a Provincial Land Disputes Appeals Tribunal could be challenged, which was by way of an appeal to the High Court on questions of law and within specified time limits, which the Plaintiff has not followed. I therefore find that the suit herein is *res judicata* and incompetently filed and should therefore be struck out for being vexatious and abuse of the process of court.

I accordingly allow the Defendant’s Notice of Motion dated 25th April 2013, and order that the Plaintiff filed herein by the Plaintiff dated 1st October 2012 and filed in court on 16th October 2012 be struck out

for being *res judicata*. The Plaintiff shall meet the costs of the Defendant's application and of this suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____17th____ day of ____September____, 2014.

P. NYAMWEYA

JUDGE