REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 15 OF 2014

SILAS NJERU NJIRU ……1ST PLAINTIFF

PETER NJUE MACHUKE ……2ND PLAINTIFF

DAVID MUTU MACHUKE ……..……3RD PLAINTIFF

VERSUS

MUGO MUKERE ……..DEFENDANT

RULING

By their plaint filed herein on 3rd January 2014, the plaintiffs sought from the defendant orders that land parcel NO. MBETI/GACHOKA/1555 is registered in the defendant's names to hold in trust for the plaintiffs and that such trust be determined and the defendant's names be cancelled from the register and the plaintiffs names be entered as absolute proprietors in equal shares.

The defendant filed a defence denying that he holds the said land in trust for the plaintiffs adding further that this matter is res-judicata and therefore this Court lacks the jurisdiction to entertain the same.

A Preliminary Objection was raised by the defendant on the ground that this suit is res-judicata. It is that Preliminary Objection that is the subject of this ruling.

I have considered the said Preliminary Objection and the submissions by counsels for the parties. I have also considered the previous cases regarding this dispute in order to arrive at a conclusion as to whether indeed this suit is res-judicata. Those previous suits are adequately identified in the said Notice of Preliminary Objection dated 5th March 2014.

Res-judicata is provided for in ***Section 7 of the Civil Procedure Act*** in the following terms:-

> ***"No Court shall try any suit or issue in which the matter 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 said 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"***

And the new ***Environment and Land Court Act of 2011*** reinforces the above in the following terms in ***Section 28:-***

> ***"The Court shall not adjudicate over disputes between the same parties and relating to the same issues previously and finally determined by any Court of competent jurisdiction prior to the commencement of this Act"***

No doubt ***Section 28 of the Environment and Land Court Act*** was meant to prevent litigants from taking advantage of this new Court to revive suits that have long been determined. That is usually a potential route of mischief once new Courts are established and the law was meant to stop such mischief occurring.

Having said so, for the doctrine of res-judicata to be successfully raised, the following elements must be established:-

1. ***The matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit***
2. ***The former suit must have been between the same parties or parties under whom they claim***
3. ***The parties must have litigated under the same title***
4. ***The Court which decided the former suit must have been competent and lastly***
5. ***The former suit must have been heard and finally decided by the Court.***

It is not in dispute that the subject matter in this dispute is land parcel No. MBETI/GACHOKA/1555. I have looked at the previous litigations involving this property and the parties herein. The first case was filed in the Gachoka Division Land Disputes Tribunal wherein the plaintiffs were SILAS NJERU, SIMON KINYUA, DAVID MUTU and PETER NJUE who are the same plaintiffs herein save that SIMON KINYUA is not a party. The defendant herein MUGO MUKERE was also the defendant in that case and the said Tribunal made its award on 29th August 1994. In its award, the Tribunal entered judgment in favour of the plaintiffs herein and ordered that they are the owners of the parcel of land MBETI/GACHOKA/1555. However, the Gachoka Division Land Disputes Tribunal had no jurisdiction to determine a dispute involving title to land – see ***JOTHAM AMUNAVI VS THE CHAIRMAN SABATIA DIVISIONAL LAND DISPUTES TRIBUNAL & ANOTHER C.A. CIVIL APPEAL No. 256 of 2002*** where the Court of Appeal held as follows:-

> ***"It is clear that the proceedings before the Tribunal related to both title to land and to beneficial interest in the suit land. Such a dispute is not, in our view, within the provisions of Section 3 (i) of the Land Disputes Tribunal Act. By* Section 159 of the Registered Land Act*, such a dispute can be tried by the High Court or by the Resident Magistrate's Court in cases where the later has jurisdiction".***

The dispute between the parties at the Gachoka Division Land Disputes Tribunal related to ownership of a registered parcel of land and clearly, that Tribunal had no jurisdiction to entertain that dispute and whatever orders it made were of no legal basis. That notwithstanding, those orders were confirmed by the Siakago Court in its LDT case No. 41 of 2002 which proceeded to draw a decree in terms of that award. There was then an appeal to the Eastern Province Land Disputes Appeals Committee by the defendant herein which appeal was dismissed on 18th April 2007 and a decree was also drawn by the Court at Siakago. However, as the Gachoka Land Disputes Tribunal had no jurisdiction to determine the dispute between the parties herein, it follows that the decision of the Appeals Committee and the decree drawn by the Siakago Court were also nullities and therefore of no legal effect. The Gachoka Land Disputes Tribunal had no powers to grant any relief or take away any right in so far as it had no jurisdiction to determine the dispute involving parcel No. MBETI/GACHOKA/1555. Under ***Section 7 of the Civil Procedure Act*** as well as ***Section 28 of the Environment and Land Court Act***, it is clear that res-judicata can only be properly invoked if the previous suit was heard and finally determined by a Court that was ***"competent"*** to try such previous suit. The Gachoka Land Disputes Tribunal was not a ***"competent"*** Court suit to try the previous dispute between the parties as it was not clothed with the jurisdiction to handle a dispute involving registered land. Therefore, the decision that it made and which was confirmed both by the Siakago Court and the Appeals Committee cannot be the basis upon which to argue that this suit is res-judicata.

This dispute did of course also end up in the High Court. In Embu High Court Judicial Review No. 40 of 2008, the defendant herein was the applicant and he was questioning the jurisdiction of the Appeals Committee to grant the orders that it did and also the jurisdiction of the Siakago Court to issue the decrees that it did in enforcing the award of the Gacoka Land Disputes Tribunal. The defendant as applicant in the Judicial Review application was therefore seeking orders to quash both the decision of the Appeals Committee and the judgment in the Siakago Court adopting the award of the Appeals Committee. The Court agreed with the defendant and quashed those decisions for want of jurisdiction. Clearly therefore, what was in issue in Embu High Court Judicial Review Application No. 40 of 2008 was not the merit or otherwise of this dispute but rather, it was confined to whether or not the Gachoka Land Disputes Tribunal, the Appeals Committee and the Siakago Courts had the jurisdiction to make the orders that they did. The High Court in Embu cannot therefore be said to have "***heard and finally decided"*** the dispute between the parties herein as required by ***Section 7 of the Civil Procedure Act***. And neither can the High Court in Embu be said to have "***finally determined"*** the dispute between the parties herein as provided for under ***Section 28 of the Environment and Land Court Act.*** All that was heard and finally determined by the High Court was the issue of the jurisdiction of the Courts and Tribunals that heard the dispute between the parties herein. Having found that those Courts and Tribunals had no jurisdiction to do what they purported to do, it follows that whatever decisions they rendered were, as I have stated above, of no legal consequences and therefore this dispute was never heard and finally determined in law.

There is then Kerugoya ELC No. 607 of 2013 which was my decision on an application by the defendant seeking to remove the prohibition/restriction registered on MBETI/GACHOKA/1555. The respondents in that case were the District Land Registrar Embu as 1st respondent and the Attorney General as 2nd respondent. The plaintiffs herein were not parties and the only order that this Court made was to order the removal of the prohibitions and restrictions placed on the said land. That case did not involve resolving any dispute about the ownership of the said land. It cannot therefore be raised to support a claim of resjudicata.

From all the above, it is clear that although this dispute had been litigated upon in Siakago Court and also in the Gachoka Land Disputes Tribunal and the Appeals Committee, the awards made by the Siakago Court and the two Tribunals cannot be the basis upon which a plea of res-judicata can be successfully raised since the Court and the two Tribunals had no jurisdiction to do what they did.

And as concerns the judgment and ruling respectively of the High Courts in Embu in Judicial Review Application No. 40 of 2008 and Kerugoya ELC Application No. 607 of 2013, both those Courts did not ***hear*** and ***finally determine*** this dispute and therefore their findings cannot also be invoked to sustain a plea of res-judicata.

The Preliminary Objection is accordingly dismissed with costs.

Finally, as the suit involves land situated in Embu and as we now have an Environment and Land Court at Embu, this case is hereby transferred to the Environment and Land Court at Embu where it shall be mentioned on 24th November, 2014 for further orders.

B.N. OLAO

JUDGE

14TH NOVEMBER, 2014

14/11/2014

Before

B.N. Olao – Judge

Mwangi – CC

Mr. Gachoka for Okwaro for Plaintiff – present

Mr. Ndegwa for Wambugu for Defendant – present

COURT: Ruling delivered this 14th day of November, 2014 in open Court

Mr. Gachoka for Okwaro for Plaintiff present

Mr. Ndegwa for Wambugu for Defendant –present.

B.N. OLAO

JUDGE

14TH NOVEMBER, 2014