



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**LAND CASE NO. 55 OF 2005**

**DAVID GOMBE GITHINJI.....PLAINTIFF**

**VERSUS**

**MARY WANJIKU GITHINJI (legal representative of  
ANDREW MAINA GITHINJI).....DEFENDANT**

**J U D G M E N T**

1. The plaintiff is brother-in-law of **Andrew Maina Githinji (deceased)** who was the original defendant. The deceased was substituted by his sister **Mary Wanjiku Githinji** who is the legal representative of the estate of the deceased. The plaintiff is the registered owner of **LR. No. Kaisagat/Chepkoilel Block 5/Amuka/42** which measures 3.039 hectares. The deceased filed a claim against the plaintiff before Kwanza Land Disputes Tribunal in which he sought part of the suit land. The Tribunal ruled that the deceased was entitled to 3 acres out of the suit land.

2. The plaintiff being dissatisfied with the tribunal ruling moved to Kitale High Court where he filed **Misc. Civil Application No. 94 of 2003** in which he sought to quash the decision of the tribunal. This application was struck out with costs on 13/4/2005. It is after the striking out of his application that the plaintiff filed this suit in which he seeks a declaration that he is the sole and legal owner of the suit land. He also seeks an injunction against the defendant from in any way interfering with the suit land.

**PLAINTIFF'S CASE.**

3. The plaintiff testified that he bought the suit land in 1975. He processed and obtained title on 5/8/2002. His brother in-law (the deceased) brought a claim against him before Kwanza Land Disputes Tribunal on grounds that he was occupying land belonging to his late mother. The Tribunal ruled that the deceased gets 3 acres out of the suit land. The plaintiff was dissatisfied with the ruling of the Tribunal. He filed **Misc. Civil Application No. 94 of 2003** seeking to quash the decision of the Tribunal. This application was struck out.

4. The plaintiff contends that he had already obtained title before the deceased filed his claim against him. He therefore contends that the tribunal had no jurisdiction to entertain a claim in respect of registered land. It is on this basis that he is seeking the prayers in the plaint.

**DEFENDANT'S CASE.**

5. The defendant who is a sister in-law to the plaintiff testified that she is the legal representative of the

deceased. The deceased had filed a claim before Kwanza Land Disputes Tribunal. The verdict of the Tribunal was adopted as judgment of the court vide **Kitale Chief Magistrate Land Case No. 63 of 2003**. The decision of the tribunal was that the deceased was to get 3 acres and the plaintiff to get 4 acres. She testified that the judgment of the court has never been appealed against.

6. Prior to the death of the deceased, the deceased had started executing the decree. He had paid survey fees and a mutation form was prepared. She testified that the deceased's family is utilizing 3 acres of the suit land and the plaintiff is utilizing the rest. She urged the court to dismiss the plaintiff's case with costs.

### **ANALYSIS OF THE LAW AND EVIDENCE.**

7. The plaintiff in this case filed the present suit whose basis was an award by the Kwanza land Disputes Tribunal. His pleadings contained in the plaint went as follows:-

***“8. In or about June, 2003, the defendant instituted a claim before Kwanza Land Disputes Tribunal against the plaintiff claiming a portion of 3 acres out of the plaintiff's land and alleging that the said 3 acres belonged to his mother, who was already deceased at the time the proceedings before the tribunal was instituted.***

9. The Kwanza Land Disputes Tribunal proceeded to hear and determine the defendant's claim against the plaintiff and made an award in favour of the defendant which was read and adopted as judgment of the court in Kitale SPM's Court Land Case No. 63 of 2003.

10. It is the plaintiff's contention that the award of the Kwanza Land Disputes Tribunal is null and void for the following reasons:-

***(a) The tribunal did not have jurisdiction to entertain or determine a claim relating to land registered under the Registered Land Act.***

***(b) The defendant did not have the requisite locus standi, at the time the proceedings before the Tribunal were instituted, since he was not at the time the personal representative of his deceased mother.***

***c. An award of a Tribunal constituted under the Land Disputes Tribunal Act No. 18 of 1990, is not exempted from provisions of the Land Control Act requiring the consent of the relevant land control board before transfer of agricultural land can be effected, and in the absence of such consent, the award alone is not sufficient to give title to agricultural land to a claimant.”***

8. From the plaintiff's pleadings, it is clear that he is faulting the proceedings of the tribunal. Under the now repealed Land Disputes Tribunal Act, there was a special procedure provided for redressing grievances arising from any decision of the tribunals established under the Act. In the present case, the deceased had filed a claim before Kwanza Land Disputes Tribunal. His claim was heard in the absence of the plaintiff who was duly informed but did not attend. During his testimony in the proceedings in this case, he conceded that he was aware of the claim against him but that he was advised by his lawyer against attending the tribunal hearings. The tribunal proceeded and heard the deceased and his witnesses. The tribunal ruled that the deceased be given 3 acres. The tribunal verdict was adopted as judgment of the court vide **Kitale SPM Court Land Case No. 63 of 2003**.

9. The plaintiff moved to the High Court and filed **Misc. Civil Application No. 94 of 2003** seeking to quash the tribunal decision as well as its adoption as judgment of the court. This application was struck out by the High Court for being incompetent. It is after this that the plaintiff filed this suit. Mr. Onyancha for the defendant contends that the suit herein is **res-judicata** and that the same amounts to a back door attempt to appeal against the decision of the tribunal. Now the issues which emerge for determination are firstly whether the plaintiff's suit is properly before the court and secondly whether the same is **res-judicata**.

10. It is clear that the plaintiff filed this suit after his application seeking to quash the tribunal decision was struck out. Under the Land Disputes Tribunal Act (now repealed) there were provisions given by which any aggrieved party could ventilate his displeasure with the verdict of the tribunal. In this case the plaintiff tried to quash the decision as provided for under the Act but he failed. Could he then come back and seek to achieve what he failed to achieve following his failed application? I do not think that he could properly do so through a plaint. The plaintiff had no option other than to exhaust the procedures provided for under the Land disputes Tribunal Act. He had no option of seeking to challenge the tribunal decision by filing a suit. In the case of **Emily Jepkemei Ngeyoni & Another vs. Nicholas Kipchumba Kogo & Another Eldoret HCCC No. 26 of 2001.** the plaintiffs filed a case in which they were challenging the decision arising from the Land disputes Tribunal. A preliminary objection was raised by the defendants on among other grounds that the plaintiffs could not file a suit by way of plaint seeking to challenge the decision of a tribunal. In upholding the preliminary objection, Justice Dulu stated as follows:-

***“The award of the Land Disputes Tribunal could be irregular, or even a nullity. However, it can only be challenged through the existing legal regime. The plaintiffs are following the wrong procedure by filing the amended plaint before this court, to challenge the decision of the Land Disputes Tribunal and its execution. They should have followed the right legal machinery.”***

The judge proceeded to strike out the amended plaint with costs to the defendants.

11. In **Eldoret HCCC No. 200 of 1996 between George Jumba vs. Joseph Metto (unreported)**, the plaintiff filed the suit against the defendant in which he sought to have the decision of the tribunal set aside on grounds that it was null and void. An application was filed seeking to have the suit dismissed. In allowing the application, Justice Nambuye as she then was held as follows:-

***“There is no doubt from the plaint that what the plaintiff wants this court to do is to quash the tribunal proceedings. As admitted by counsel for the defendant/applicant the provisions of the Tribunal Act are specific and clear as to what matters are to come before the High Court. The procedure is that once an award of the tribunal has been adopted as an order of the court, an aggrieved party can only come to the High Court to seek Judicial Review and secondly by way of Appeal on points of law from an appeal to the Provincial Tribunal Board”***

She went on to state:-

***“If the plaintiff is aggrieved he can seek declaration in respect of his rights and or interest in the subject matter divorced from the Tribunal's proceedings***

***(emphasis mine)***

12. In dealing with a similar situation in Kitale HCCC No. 31 of 2011 **Costa Sote Kandie (suing as a legal representative of the Estate of the late Cheptum Arap Chesire) Vs. Legetyo Kosyin (Noigam Women Group) & Another,** I rendered myself as follows:-

***“The proceedings which the plaintiff is seeking to have declared null and void were as a result of a procedure provided under the defunct Land disputes Tribunal Act.***

***The Act provided for a special procedure by which an aggrieved party can proceed. After the verdict of the Cherangany Land Disputes Tribunal was read, the plaintiff was at liberty to file an appeal to the Provincial Land Disputes Appeals Committee and if she was to be unsuccessful, she had the option of appealing to the High Court against the committee's decision on points of law.***

***Alternatively, she had the option of moving to the High Court seeking to quash the decision of the Tribunal as well as the Chief Magistrate's adoption of the award as judgment of the court. The plaintiff had no option of filing a suit by way of plaint seeking to quash the proceedings.”***

13. The plaintiff's suit cannot be sustained on this ground. I now move to address the issue of *res-judicata*. The proceedings before the Kwanza Land Disputes Tribunal were in respect of the same suit land. The parties in that suit as well as the present suit are the same. The dispute was resolved and the verdict adopted as judgment of the court vide Kitale Chief Magistrate Land Case No.63 of 2003. The tribunal was competent in the sense that the Act gave it powers to decide on the dispute. Whether it had jurisdiction to entertain the claim or not cannot be a subject of the present suit. It ought to have been attacked in the manner provided for under that Act. The verdict may have been null and void but that is a matter outside the procedure followed by the plaintiff herein. Unless and until the tribunal verdict is set aside through proper procedure, it remains and had determined the dispute. I therefore find that this suit is not only improperly before the court but it is also *res-judicata*.

14. The Court of Appeal decision cited by Mr. Kiarie is distinguishable in that, in that appeal, the High Court had quashed the decision of the tribunal and the Magistrate's Court which had adopted it. When an appeal was preferred against the High Court decision, the Court of Appeal found that the High Court judge was right in quashing the decision of the tribunal on account that the tribunal lacked jurisdiction to entertain the dispute. This is not the case in the present suit where the plaintiff is faulting the verdict of Kwanza Land Disputes Tribunal after failing to have the same quashed.

#### **DETERMINATION.**

15. I find that the plaintiff's suit cannot be maintained. The same is hereby dismissed with costs to the defendant.

**[Dated, signed and delivered at Kitale on this 18th day of December, 2014.]**

**E. OBAGA.**

**JUDGE.**