



**Sawe (Suing as legal representative of Daniel Kibwalei Sawe) v Keiyo
Division Land Dispute Tribunal & another (Judicial Review Cause
E002 of 2022) [2023] KEELC 949 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 949 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
JUDICIAL REVIEW CAUSE E002 OF 2022**

**L WAITHAKA, J
FEBRUARY 17, 2023**

BETWEEN

**HARON KIPROP SAWE (SUING AS LEGAL REPRESENTATIVE OF DANIEL
KIBWALEI SAWE) PLAINTIFF**

AND

KEIYO DIVISION LAND DISPUTE TRIBUNAL 1ST DEFENDANT

JOSEPH KEMBOI 2ND DEFENDANT

RULING

1. By a Plaint dated May 17, 2022 and filed on May 19, 2022 the plaintiff filed the instant suit seeking judgment against the defendants jointly and severally for:-
 - a. A declaration that the proceedings and the award made by Keiyo Division Land Dispute Tribunal on 24th May, 2006 and the subsequent judgment and decree given pursuant to the said award in Iten Resident Magistrate Court Land Dispute Case No.11 of 2006 between the plaintiff and the 2nd defendant are illegal, null and void and without jurisdiction;
 - b. An injunction permanently restraining the 2nd defendant, his servants and or agents from entering, occupying and or otherwise interfering with land parcel number Elgeyo Marakwet/ Lower Muskut/312; hereafter suit land.
 - c. Costs of the suit and interest;
 - d. Any other relief this honourable court may deem just and expedient to grant.
2. The suit is premised on the grounds that the plaintiff has been in occupation of the suit land the same having been his ancestral land and that the plaintiff was registered as the proprietor of the suit land on September 7, 1982.



3. The plaintiff complains that following a dispute lodged by the 2nd defendant before the Keiyo Division Land Dispute Tribunal, the Tribunal awarded the suit land to the 2nd defendant. The award was later adopted as a judgment of the court by Iten Resident Magistrate court and a decree issued in favour of the 2nd defendant.
4. Complaining that the award of the Tribunal was never read and delivered to the parties and that he was not given any notice of filing, reading and entry of judgment by the court on the basis of the award, the plaintiff contends that all proceedings before the Tribunal and the lower court were illegal, null and void as the Tribunal did not have jurisdiction to adjudicate upon a claim touching on ownership of land registered under the provisions of the Registered Land Act, cap 300 Laws of Kenya (now repealed). The plaintiff further contends that the Tribunal acted ultra vires the provisions of sections 27, 28 and 148 of the Registered Land Act (Repealed).
5. It is pointed out that there existed previous proceedings between the parties to this suit namely Iten RMC Land Case No. 11 of 2006 wherein the impugned award of the Tribunal was adopted; Eldoret Miscellaneous Civil Appeal number 574 of 2006 that was dismissed for want of prosecution and Iten ELC case No.8 of 2018 which was also dismissed for want of prosecution.
6. Vide his statement of defence filed on June 13, 2022 the 2nd defendant inter alia contends that due process of the law was followed in making and adopting the award of the Tribunal; that following adoption of the award as judgment of the court, he has been in actual, peaceful, open, continuous, vacant and uninterrupted possession of the suit land for over 16 years.
7. Arguing that the award of the Tribunal and the judgment of the lower court can only be challenged through judicial review proceedings or a statutory appeal under the Land Disputes Tribunals Act (now repealed) and not a fresh suit, the 2nd defendant acknowledges that the decree issued in his favour has not been executed but explains that he has been prevented from executing it by existence of a charge in the register of the suit land registered in favour of National Bank of Kenya restricting dealings with the suit land.
8. In his statement of defence, paragraph 14 thereof, the 2nd defendant intimates an intention to move the court for the suit to be struck out on the grounds that it is res judicata, time barred and for alleged want of jurisdiction of this court to hear and determine the suit. The 2nd defendant further contends that the suit is frivolous, vexatious, scandalous and abuse of the process of the court.
9. In line with his intention to move the court for dismissal of the suit on the above grounds, the 2nd defendant filed the notice of preliminary objection dated July 26, 2022 seeking to strike out the suit herein on the grounds mentioned herein above.
10. Pursuant to directions given on October 11, 2022 that the notice of preliminary objection be disposed off by way of written submissions, the 2nd defendant and the plaintiff filed submissions in respect of the preliminary objection.

Analysis and determination

11. From the preliminary objection and the submissions filed in respect thereof, I find the issues for the court's determination to be:-
 - i. Whether the instant suit is res judicata;
 - ii. When the instant suit is time barred?
 - iii. Whether this court has jurisdiction to hear and determine the suit;



- iv. Whether the suit is frivolous, vexatious, scandalous and an abuse of the process of the court;
 - v. What order should the court make.
12. On whether the suit is res judicata, based the provisions of section 7 of the *Civil Procedure Act* and the decision in the case of *Christopher Kenyariri v Salama Beach* (2017)e KLR cited with approval in the case of *Clement Masanga Atonga v Lewkadia Milungi* (2021)e KLR it is submitted that the 2nd defendant has demonstrated that the instant suit is res judicata as the issues in the instant suit were directly and substantially in issue in Iten Resident Magistrate Court Land Dispute Case No.11 of 2006; that the parties in this suit and in Iten Resident Magistrate Court Land Dispute Case No. 11 of 2006 and the instant suit are the same; that parties were litigating under the same title and that the issues raised in the instant suit were heard and finally determined in Iten Resident Magistrate Land Dispute Tribunal Case No.11 of 2006 when the court adopted the award of the Tribunal as its judgment.
 13. In his submissions the plaintiff contends that the suit is not res judicata as the Tribunal did not have jurisdiction to hear and determine the issue presented before it and that the issues raised in the previous proceedings were not heard and determined on their merits. In that regard reliance is placed on section 7 of the *Civil Procedure Act* and the cases of *Moses Mbatia v Joseph Wamburu Kihara* (2021) eKLR; *Nicholas Njeru v The Attorney General & 8 others* (2013) e KLR, *David Kipteting Chemei v Kanamoi Cheptoo Kimoituk & another* (2021) e KLR, *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* (2017) e KLR.
 14. The court's view on the issue as to whether the instant suit is res judicata the previous proceedings before the land disputes Tribunal and Iten magistrate court is that the doctrine/principle of res judicata does not arise in the circumstances of this case because a question of law arises as to whether the Tribunal had jurisdiction to hear and determine the dispute preferred before it to determine. There being no conclusive decision on that issue and taking into account numerous decisions of this court (Environment and Land Court) and the Court of Appeal to the effect that the Tribunal had no jurisdiction to hear and determine disputes touching on registered land, I am of the considered view that the 2nd defendant's preliminary objection cannot turn on the contention that the instant suit is res judicata the previous proceedings.
 15. On the contention that the decision of the Tribunal and the judgment in respect thereof could only be challenged through judicial review proceedings or statutory appeal, parties have presented before me two conflicting decision of courts of concurrent jurisdiction on the issue. The defendant cited the case of *Jepkemoi Ngeyoni v Nicholas Kipchumba Kogo & another* (2006) eKLR where it was observed:-

“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 machinery....The two options for challenging a land disputes Tribunal's award are through an appeal to the provincial appeals committee, within 30 days, and before the award was registered in the magistrate's court. The other option was to file proceedings for judicial review in the High Court under order LIII Civil Procedure Rules after the decision of the Tribunal was registered in the magistrate's court. Therefore, its my finding that the decision of the land disputes Tribunal cannot be challenged through suit. As the decision of the Tribunal was registered in the subordinate court filing suit, in any event, would be fresh proceedings, in a matter in which a decree of the subordinate court could have already been issued. Filing multiplicity of cases in court on the same matter is not acceptable in law.”



16. The plaintiff on the other hand, relied on the decision in the case of *Jamin Kiombe Lidodo v Emily Jerono Kiombe & another* (2013) e KLR where Munyao J, stated as follows:-
- “My own opinion of the matter is that there is no bar to filing a suit to declare the decision of a land disputes Tribunal null and void. True, the avenues of appeal and judicial review are available, but I am not of the view that these are the sole avenues for relief. I am more inclined to associate myself with the decision of Nambuye J. in the *Daudi Ngetich Kimibei case* and that of the Court of Appeal in the *Robert Entwistle case*. With respect, I decline to respect the decision in *Emilly Jepkemei Ngeyoni*. I am of the stand that the plaintiff is perfectly entitled to file this suit seeking *inter alia* declaration that the decision of the Tribunal was made without jurisdiction...”
17. In addressing the issue as to whether the decision of the Land Disputes Tribunal can be challenged by way of suit, I will be guided by the decision in the case of *Speaker of the National Assembly v James Njenga Karume* (1992)e KLR where it was stated:-
- “In our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”
18. In applying the principles enunciated in that case to the circumstances of this case where the plaintiff had unsuccessfully challenged the decision of the Tribunal, I am of the considered view that allowing him to challenge the decision by way of a fresh suit many years after the decision may set a bad precedence where vexatious litigants who failed to challenge the decisions of the Tribunals established under the Land Disputes Tribunal Act (now repealed) propelled by the avenue created may flood the court with stale cases.
19. In the circumstances of this case, no good explanation has been offered by the plaintiff why he did not prosecute the appeal that he preferred against the decision of the Tribunal or even the other cases that he filed but failed to prosecute concerning the subject matter of this suit. The conduct of the plaintiff of filing multiplicity of suits concerning the subject matter of this suit is vexatious and ought not to be entertained.
20. On whether the suit is time barred, reference is made to section 7 of the *Limitation of Actions Act* and the cases of *Edward Moonge Lengusuranga v James Lanaiyara & another* (2019)e KLR and *Dickson Ngige Ngugi v Consolidated Bank Limited & another* (2020) eKLR and submitted that the instant suit is time barred as it was brought after 12 years after the cause of action accrued to the plaintiff or to a person through whom the plaintiff claims. The 2nd defendant contends that in the circumstances of this case, the cause of action in respect of the suit land arose on 26th May 2006, when the award of the Tribunal was adopted as the judgment of the court. Pointing out that the instant suit was filed 16 years later and arguing that no explanation has been offered why it took the plaintiff all that time to initiate the recovery action, the 2nd defendant submits that the instant suit is time barred.
21. In reply, the plaintiff contends that the suit is not for recovery of the land but for a declaration that the award of the Tribunal was illegal, null and void for want of jurisdiction. It is further contended that no right of action arises under Section 7 of the Act as the plaintiff is in possession and occupation of the suit land. Based on Section 13(1) of the *Limitation of Actions Act*, it is submitted that a claimant seeking to rely on section 7 of the Act must show that he is in possession of the land adverse to that of the registered owner or from whom he seeks to lay a claim against.



22. Claiming that he is the one who is in possession of the suit land, the plaintiff submits that no right of action arises under section 7 of the Limitation of Actions Act because he is the one in possession of the suit land. It is noteworthy that both the plaintiff and the 2nd defendant claim to be in possession of the suit land).
23. Having read and considered the issues raised in the pleadings and taking into account that both the plaintiff and the 2nd defendant claim to be in occupation of the suit land and the acknowledgement by the 2nd defendant that the decree issued in his favour has not been executed, I am not satisfied that the 2nd defendant has made up a case for determination that the instant suit is time barred. In my considered view, a determination as to who between the plaintiff and the defendant is in occupation of the suit land and from when needs to be made, before a decision as to whether the plaintiff's claim is time barred can be made. Since evidence is required to determine that fact, the preliminary objection cannot be sustained based on that ground.
24. Although the plaintiff's suit may not be statute barred, clearly, there was inordinate unexplained delay in moving the court for purpose of challenging the award of the Land Disputes Tribunal made more than 15 years before the suit to challenge it was filed. I am also of the view that it would be improper to allow the plaintiff who unsuccessfully challenged the decision of the Tribunal by way of judicial review to have a second bite of the cherry by filing a fresh suit to challenge the award and the judgment arising therefrom. In the circumstances of this case, I am of the considered view that the plaintiff is estopped both by the statutory process of challenging the decision of the Tribunal and his conduct, filing multiplicity of suits to challenge the decision without prosecuting them leading to dismissal for want of prosecution and inordinate delay in bringing the instant suit, from challenging the decision of the Tribunal by way of a fresh suit.
25. Justice cannot be pursued by an regulated series of hits and misses as the plaintiff is trying to do. If a suit is dismissed for want of prosecution, the Law provides for mechanisms of reinstatement of the suit provided there are good reasons for doing so. If litigants were allowed to file fresh suits after their cases are dismissed for want of prosecution nothing would prevent litigants from using the avenue to vex their opponents through stale and vexatious suits.
26. The upshot of the foregoing is that the preliminary objection has merit and is sustained on the ground that the suit offends the requirement of exhaustion of available remedies and is not only vexatious but also an abuse of the process of the court for having been filed long after the course of action arose in favour of the plaintiff and after a series of other cases in respect of the subject matter of the suit. Consequently, I strike out the suit instituted vide the plaint dated May 17, 2022 and filed on May 19, 2022 with costs to the 2nd defendant.
27. Orders accordingly.

RULING READ, DATED AND DELIVERED, AT ITEN THIS 17TH FEBRUARY, 2023

L. N. WAITHAKA

JUDGE

In the presence of:-

Mr. Kigen for the plaintiff

Mr. Lagat for the defendant

