



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL APPEAL NO. 39 OF 2019**

**PETERSON KIRAGU KARIUKI.....1<sup>ST</sup> APPELLANT**

**DANIEL NDURU KARIUKI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**AGNES THONGORI MWANGI.....RESPONDENT**

**(Being an appeal from the Judgment and Decree of the Chief Magistrate Hon. W. Kagendo in**

**Nyeri Chief Magistrate's Civil Case No. 424 of 2012 delivered on 28/9/2018).**

**JUDGEMENT**

**Brief Facts**

1. This is an appeal from the judgement of Nyeri Chief Magistrate whereby the appellant instituted a suit vide a plaint dated 18<sup>th</sup> September 2012 in which they sought orders for vacant possession, a permanent injunction restraining the respondent from entering and/or interfering in any way with Plot No. 4 Kagonye market as well as damages for trespass and conversion.
2. The trial court delivered judgement on 28<sup>th</sup> September 2018 whereby the appellants' suit was dismissed with costs to the respondent. The trial court was of the view that the suit was *res judicata* as the issues were dealt with in another suit Nyeri HCCC No. 88 of 1978.
3. Being aggrieved by the decision of the trial court, the appellants lodged the instant appeal citing seven(7) grounds of appeal which can be summarised as follows:-
  - a) That the Honourable trial magistrate erred in law and in fact by finding that the suit was *res judicata*;
  - b) That the Honourable trial magistrate erred in law and in fact by concluding that section 4(4) of the Limitations of Actions Act did not apply to the suit.
4. Parties hereby disposed off the appeal by way of written submissions.

**The appellants' Submissions**

5. It is the Appellants' submission that this suit is not *res judicata*, as they relied on section 7 of the civil Procedure Act and on the case of **Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017]eKLR**. According to the appellants, in Nyeri HCCC No. 88 of 1978 (hereinafter referred to as the "former suit") the issues involve non payment of rent in contradiction to the present suit herein that seeks eviction or vacant possession; injunction and damages of trespass and conversion. Further the matter in Nyeri HCCC No. 88 of 1978 was disposed off through arbitration. As such, it cannot be said that the issues were substantially heard and determined in the Nyeri case.
6. The appellants submit that the parties to this suit are not the same as the ones in the former suit nor is the jurisdiction the same. Therefore from the foregoing, it is argued that the suit herein is not *res judicata* as was ruled by the learned magistrate.
7. The appellants submitted that the respondent by relying on a judgment delivered in the Nyeri Civil case No. 88 of 1978 on 23/11/1984 to lay a claim over the suit property is in contravention of section 4(4) of the Limitation of Act and amounts to denying the appellants the right

to exclusive use and possession of the said plot. The respondent's actions in purporting to claim a legitimate share over plot no. 4 KAGONYE is time barred. The appellants' relied on the case of **ELC No. 5704 of 1992 (OS) Hudson Moffat Mbue vs Settlement Fund Trustees & 3 Others (unreported) in Koinange Investments and Development Company Limited vs Ian Kahi Ngethe & 3 Others [2015]eKLR.**

8. The appellants further submit that the respondent is indirectly seeking to execute the judgment in Nyeri HCCC No. 88 of 1978 in the guise of exerting her right to a share in the suit property. The appellants made reference to the cases of **Gathoni vs Kenya Co-operative Creameries Ltd [1982] KLR 104 and Iga vs Makerere University [1972] EA** in support of this contention.

9. The appellants contend that they proved their case on a balance of probability for instance they produced a search certificate to show that their deceased father was the owner of the suit property; they conducted a succession cause in which the suit property was transferred to them and produced a search certificate to demonstrate that they are the current registered owners; minutes by the then Nyeri County Council approving the transfer and receipts for the payment of the said suit property.

10. It was further argued that the respondent relied on the judgement of Nyeri HCCC No. 88 of 1978 claiming to be the widow of the late Robert Mwangi, who was a party in the said case but did not produce any letters of administration over the estate of her late husband. She further did not adduce any evidence to show that she resided on the suit property and therefore she is a trespasser.

11. The appellants conclude their submissions by stating that besides being a trespasser, the respondent is also guilty of conversion. The appellants rely on the **Halsbury's Laws of England, 4<sup>th</sup> Edition pg 355 para 548** which elaborate on the essence of conversion. The appellants state that in line with the passage in the Halsbury's Laws of England, the respondent has appropriated their property to her benefit which amounts to conversion. The appellants submit that the court do allow their appeal in its entirety and set aside the judgment of the trial court.

### **Respondent's Submissions**

12. The Respondent submits that what is not in dispute is that there was a suit Nyeri HCCC No. 88 of 1978 between Joel Kariuki (the plaintiff) and Robert Mwangi (the defendant) involving Plot No. 4 Kagonye village. She argued that the suit property herein is similar to the suit property in the former suit. The appellants herein are sons of Joel Kariuki (deceased), the plaintiff in the former suit and the respondent is the widow of Robert Mwangi (the deceased) the defendant in the former suit. That the former suit was arbitrated by the Chief, George Gichana of Kahiga Location and that his award was read and explained in court on 3/5/1984. Judgment was entered on 23/10/1984 where both Joel Kariuki and it was ordered that the property be shared equally. There was no appeal lodged by any of the parties against the court's judgement which determined ownership of plot No. 4 Kagonye.

13. The respondent submitted that the matter herein is *res judicata* and relied on **section 7 of the Civil Procedure Act** and the case of **Florence Maritime Services Ltd & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR.**

14. The respondent submitted that in the former suit the plaintiff made a claim of ownership to the suit property and sought payment of rents arrears from the defendant. The defendant claimed joint ownership of the suit property with the plaintiff and denied that rents were due and payable by him. The arbitral award made a finding that the suit property was jointly owned by the plaintiff and defendant and that no rent was payable by the defendant for occupation of the suit property.

15. Whereas the suit in the trial court raised the issue of ownership and trespass to the suit property the only difference between the two suits is the issue of rent and claim of trespass. The respondent submits that it is the same issue claimed under different headings as the evidence to establish either claim will lead to the same result of ownership.

16. The current parties to this suit are claiming under the previous parties because the parties in the former suit are one Joel Kariuki and Robert Mwangi whereas Joel Kariuki is the father of the two plaintiffs in the suit in the trial court and the appellants herein and the defendant is the wife of the defendant in the former suit and the respondent herein. The original litigants in the former suit are both deceased.

17. On whether the court which determined the original claim had jurisdiction to determine the current claim, the former suit was determined by the High Court in which the arbitral award by the chief was adopted by the high court as a judgment of the court. In that regard, what the appellants ought to have done is to exercise their right of appeal or review and not institute another suit claiming ownership and accusing the respondent of trespass and conversion. They could not review the decision of the high court in the lower court because the lower court had no jurisdiction. In saying so, the respondent relies on the case of **Nancy Mwangi t/a Wortlin Marketers vs Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 Others [2014]eKLR.** Consequently, by not exercising their right to appeal the appellants accepted the judgment and cannot now claim to have an objection to it.

18. The respondents further submitted that there must be an end to litigation and legal certainty. To support this position she relied on the cases of **Abdul Kassim Hassanali Gulam Hussein Khala vs Southern Credit Banking Corporation Ltd (2006) eKLR and Bernard Mugo Ndegwa vs James Nderitu Githae & 2 Others (2010) eKLR.**

19. The respondent submits that the appellants have misunderstood **section 4(4) Limitation of Actions Act** and according to the respondent's understanding, one cannot apply for execution of judgment after the expiration of 12 years. In saying so she relied on the case of **Koinange Investments and Development Company Limited vs Ian Kahi Ngethe & 3 Others [2015]eKLR.** She further contends that the issue herein is not one of execution but the validity of the judgment.

20. The respondent further contends that the trial magistrate analysed all the evidence and came up with a judgment based on the evidence. She needed not raise any counter claim for the trial magistrate to find that the suit was *res judicata*.

21. The respondent submits that she has a legitimate claim of right over the suit property and therefore cannot be a trespasser in her land. In that regard she will not address the issue of conversion.

22. The respondent concluded her submissions by stating that the appellants are not entitled to the prayers they are seeking and therefore the appeal should be dismissed with costs.

#### **Issues for determination**

23. On perusal of the record of appeal, and the parties rival submissions, there are three issues for determination:-

- a) Whether magistrates erred in finding that the issues raised herein are *res judicata*
- b) Whether section 4(4) of the Limitation of Actions Act affected the suit herein
- c) Who between the parties ought to meet the costs of this appeal.

#### **The Law**

24. Being a first Appeal, the court relies on a number of principles as set out in **Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:**

25. **“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”**

26. It was also held in **Mwangi vs Wambugu [1984] KLR 453** that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

27. Dealing with the same point, the Court of Appeal in **Kiruga vs Kiruga & Another [1988] KLR 348**, observed that:-

28. **“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand..”**

29. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

#### **Whether the issues raised herein amount to res judicata**

30. The principle of *res judicata* is found in **Section 7 of the Civil Procedure Act** which provides:-

**“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.”**

31. This doctrine has been explained in a number of cases but I rely on the case of **The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others Nairobi CA Civil Appeal No. 105 of 2017 [2017] eKLR**, the Court of Appeal held that:-

**“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are tendered not in disjunctive but conjunctive terms;**

- a) **The suit or issue was directly and substantially in issue in the former suit**
- b) **That the former suit was between the same parties or parties under whom they or any of them claim**
- c) **Those parties were litigating under the same title.**
- d) **The issue was heard and finally determined in the former suit.**
- e) **The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised**

32. The court explained the role of the doctrine thus:-

**“The rule of doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and afford parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and for a, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”**

33. Cognizant of the above principles, the courts called upon to decide issues in suits previously canvassed or which ought to have been raised and canvassed in the previous suits have not shied away from invoking the doctrine as a bar to further suits. As was stated in **Henderson vs Henderson (1843) 67 ER 313**, *res judicata* applies not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. In the case of **Mburu Kinyua vs Gachini Tutu (1978) KLR Madan, J.** Quoting with approval **Wilgram V.C in Henderson vs Henderson** (supra) stated:

**“Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except in special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject on contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident omitted part of their case. The plea of *res judicata* applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation, and which parties exercising reasonable diligence, might have brought forward at the time.”**

34. On perusal of the record the proceedings of Nyeri HCCC No. 88 of 1978 have been produced on pages 20-28. It is worth noting that the pleadings in the suit were not produced. Looking to the proceedings of the claim in the said suit the parties were Joel Kariuki vs Robert Mwangi. The parties agreed by consent that the dispute be arbitrated by Chief George Gichane of Kahiga Location whereas, the judgment of the court was entered in terms of the arbitral award. The Chief after listening to the parties and evidence produced before him came to the conclusion that the suit property belongs to both Joel Kariuki and Robert Mwangi and should be shared equally. The elders rejected the claim of rent arrears on the grounds that there was no tenancy agreement between Robert Mwangi and Joel Kariuki.

35. This position is supported by the search certificate produced by the appellants on page 35 of the record of appeal which shows that the suit property was registered in the name of Joel Kariuki.

36. From the foregoing, it is evident that the high court dealt with the issue of ownership of plot No. 4 Kagonye Market Contrasting with the present suit, the claim is for eviction and vacant possession. I am of the considered opinion that the issues are similar because one determines the ownership of a property so that the rightful owner can ask the court to evict the other party who is there illegally i.e a trespasser. It follows that the issues in the two suits are similar and all revolve around ownership of the same plot.

37. The said Joel Kariuki was the father to the appellants whereas Robert Mwangi is the late husband to the respondent. The parties in my view are similar because the appellants are closely related to the plaintiff and the defendant all possessed of inheritance rights from the parties in the former suit. I am persuaded by the case of **Omondi vs National Bank of Kenya Ltd & Others [2001] E.A 177** where it was stated that **“parties cannot evade the doctrine of *re judicata* by merely adding other parties or causes of action in a subsequent suit.”** In this case herein, the former suit was heard and determined via arbitration and the arbitral award was adopted as a judgment in the high court and that the learned magistrate did not err in finding.

38. The High court by entering judgement in terms of the arbitral award on 23/11/1984, and being a competent court of law, determined the ownership of plot No. 4 Kagonye between the late father of the appellants and the late husband of the respondent. It was declared that parties owned the said property in equal shares. At the time of the filing and the determination of the Nyeri suit, the late husband of the respondent was in actual possession of his half share. This share was taken over by the respondent upon the death of her husband.

39. The issues of vacant possession and eviction were determined by the High Court when it entered judgement as per the award exonerating the defendant of trespass and being a tenant in the premises. The two issues trespass and conversion are always based on ownership and cannot exist independently. The ownership are determined by the High Court is still valid since no appeal was filed by the appellant’s father. The appellant’s suit is therefore misplaced and incompetent. The Chief Magistrate had no power to review the High court judgment for the court is superior to that of the magistrate. The suit giving rise to this appeal ought to have been dismissed for being incompetent in addition to being *res judicata*.

40. It is my considered view that the issues of vacant possession and eviction were *res judicata* and the suit was incompetent under Section 7 of the Civil Procedure Act. The learned magistrate was right in dismissing the said suit.

#### **Whether section 4(4) of the Limitation of Actions Act affected the suit herein**

41. Section 4(4) of the Limitation of Actions Act provides:-

**An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of default in making the payment or delivery in question, and no**

**arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.**

42. The above provision relates to the execution of a judgment which provides that a judgement should be enforced before the expiry of 12 years limitation period. In my considered view Section 4(4) of the Limitation of Actions Act does not apply to the facts herein for the reasons that the suit herein is res judicata. Secondly the respondent's husband was in occupation of the suit since 1967 which deems that the respondent was also in occupation as well at the time her husband passed away and in any event the respondent has rightful claim over the land by virtue of her husband being a joint owner of the suit property. Therefore the argument that the respondent was seeking execution of the said judgement in Nyeri case No. 88 of 1978 does not arise. Thirdly, it is clear that the suit herein does not touch on the issue of execution of judgement but the validity of the judgment. The said judgment in the former suit is still valid as no appeal or review has been made against it. It can be correctly be said that appellants were satisfied with the judgement and thus the reason for failure to file an appeal.

43. It was argued that the respondent did not produce letters of administration for the estate of her deceased husband. The appellants did not dispute the respondent's relation with Robert Mwangi and as such there was no issue requiring proof.

44. It is said that in succession proceedings of their father, the court gave them the whole plot No. 4 Kagonye to inherit. If this happened, the appellants were guilty of non-disclosure of facts material to the case that could lead to revocation of the grant.

### **Conclusion**

45. I reach a conclusion that this appeal lacks merit and is hereby dismissed with costs to the respondent.

46. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 29<sup>TH</sup> DAY OF APRIL, 2021.**

**F. MUCHEMI**

**JUDGE**

**Judgement delivered through video link this 29<sup>th</sup> day of April, 2021.**