**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL APPEAL NO. 138 OF 2012**

**DANIEL ONSARIGO MOKAMBA**

**(Suing as the legal representative of the estate of**

**LABAN MOKAMBA-DECEASED)................................APPELLANT**

**VERSUS**

**JOHNSON BIGOGO.........................................1ST RESPONDENT**

**CHARLES BIGOGO..........................................2ND RESPONDENT**

**JUDGMENT**

1. The appellant herein Daniel Onsarigo Mokamba(suing as the legal representative of the Estate of Laban Mokamba) was the plaintiff in SRM's court at Keroka in Civil case No. 275 of 2010. He sued the respondents then the defendant herein Johnson Bigogo and Charles Bigogo. In his plaint the appellant averred that his father the late Laban Mokamba was at all times the registered proprietor and owner of all that parcel of land known as Plot No. 117 isolated, Keroka town measuring 25 by 200 feet (hereby also known as the suit premises and is therefore entitled to exclusive rights over the same to the exclusion of all and sundry including the respondents.

2. The appellant further averred that on or about 1st August, 2010 the respondents without lawful cause, basis or right trespassed onto the suit premises and destroyed/damaged the entire fence surrounding it and commenced erecting toilets and bathrooms thus depriving the appellant who has suffered loss thus he (appellant) claimed damages for the trespass and massive profits.

3. In addition to this, the appellant also claimed against the respondents jointly and/or severally for a declaration that the suit premises belonged to and formed part of the estate of the late Laban Mokamba and seeks an order of eviction and demolition of any structure erected on the suit premises by the respondents and further for an order of permanent injunction restraining the respondents or their agents, servants and/or anyone claiming under them from re-entering, fencing, trespassing onto, building onto interfering with and/or in any other manner dealing with the suit premises.

4. The respondents on their part, entered appearance and filed defence in which they denied the allegations by the plaintiff and put the plaintiff to strict proof. Moreover the respondents averred that the suit was bad in law, defective, the same should be dismissed with costs, it was res judicata, offends section 7 of the Civil Procedure Act, hat the suit was barred by the Limitations of Actions Act and lastly

that the respondents were defending themselves on behalf of the estate of Bigogo Kebaso who had originally had a suit against the late Laban Mokamba.

5. When the matter proceeded to formal proof in the lower court, the appellant testified as PW1. In support of his case he told the court that the deceased Laban Mokamba was his father, he had filed a succession cause and was granted a limited grant which he produced as Exhibit.1. He however contended that he did not know the 1st respondent but rather he knew the 2nd respondent. That the deceased owned the suit premises measuring 25 x 100 feet, the said land formed part of the deceased property he was to manage and on 1st August, 2010 the respondents unlawfully entered the suit premises, destroyed the fence around it, started digging pit latrines and building bathrooms yet the suit premises did not belong to them.

6. Moreover, he confirmed that indeed when he saw the respondents trespassing on the suit premises he reported the matter to the police as the respondents had not asked for his permission and neither did they (respondents) show him any documents indicating that they were the owners of the suit premises.

7. He thus asked the court to declare the suit premises belonged to the deceased, an eviction order to issue against the respondents and a permanent injunction to stop them(respondents) from re-entering the suit premises and that the respondents be condemned to pay costs of this suit.

8. Lastly, he contended that the matter had already been arbitrated between the deceased and the respondents late father, that they went to the High Court and to support this he produced ref minutes copies No, 2, 3,4, court proceedings 5, Decree 6, demanded letter 7, receipts 8 and lastly a copy of a letter to Keroka council and valuation report. In addition to this, he contended that he had no issue with plot No. 129 but plot no. 117(the suit premises).

9. On cross examination the appellant revealed that the respondents were his neighbours, his land (suit premises) borders theirs. That though the issue of boundary was dealt by the High Court the respondents were still encroaching on the suit premises as they fenced, the suit premises together with theirs and subsequently erected latrines and bathrooms. This marked the end of the appellants case in the lower court.

10. The respondents on their part called 3 witnesses. DW1 was the 1st respondent. He told the court that his late father bought plot No. 129 which was located behind Keroka Post office measuring 100 x100. After his father one Bigogo Kebaso passed away they filed a succession cause dated 3rd August, 2010 and he has since been administering the said plot. He also acknowledged the fact that they have been paying rates but for the last 3 months they had not paid. He also produced a plot card in his deceased father's name as DExhibit.2 and acknowledged that his late father had a case with the appellants deceased father in the High Court of Kisii No. 260 of 1988 as the deceased had encroached on their late father's land. That vide a letter dated 21st February, 1989, by the town council of Keroka the boundaries were fixed as per the boundaries map D.Exhibit.4. Lastly he acknowledged that the appellant's suit premises were adjacent to their plot as the land lies vertically.

11. On cross-examination he denied but admitted that he had trespassed on the suit premises, his late father was the one who had put pit latrines on the land, he had not done any activity on the land though there were some building materials that had been put there by his late father. He however reiterated by stating that there is no case in court over plot No. 129 between them and the appellant.

12. DW2 was Joseph Moreka Kibari. He told the court that his father one Kibari Ndigisi sold land to the late Bigogo Kibari(respondents father) a plot in Keroka township behind the post office measuring 100 x 75 which was sold in 1979. That the said buyer built houses on both sides but in 1982 the council came and fenced off the area and wanted to take it under Keroka town Council. However, his father filed a suit in Kisii High court and it was ruled in 1989 that his father should get back his land and the people he had sold it to.

13. DW3 was Patrick Mutai a District Physical planner in-charge of Kisii County. He referred to PMFI-4

and confirmed that the same originated from their office prepared on 19th February, 1991 and it was genuine. He revealed to the court that the plot in contention (suit premises) was covered in their plan under zone section (6) which was meant for committee purposes. Furthermore, he explained that the suit premises are assessed by a 6 mere road and there is also another 6 metre road fronting the Kisii-Sotik highway.

14. Lastly, he contended that he was not in a position to comment on the measurements, he only knew about the user, genuine nature of the plan and what the plot was meant for. He then produced DMFI-4 as exhibit.4.

15. On cross-examination, he revealed that as a physical planner he cannot tell the measurements of the plot. He also revealed that he did not know if the court orders were followed and re-alignment of boundaries done. This marked the end of the respondents court.

16. Counsel representing each party filed their respective submissions. The trial court in its judgment after considering the pleading, evidence and submissions filed held that the evidence adduced by the appellant failed to prove that the respondents have trespassed on their plaintiff's and as the orders sought in Civil suit No. 260 of 1998 which was cited by the High Court appear not to have been followed. The learned trial magistrate further held that the map produced by the respondents failed to show which land belonged to the appellant and which belonged to the respondent as the A and B plots deliberated over in the aforementioned High Court suit. Therefore, the appellant's suit was dismissed as being resjudicata with costs to the respondents.

17. The above judgment and decree triggered this appeal by the appellant. In his Memorandum of Appeal dated 7th November, 2012 and filed in court on 8th November, 2012, the appellant has appealed against the entire judgment and decree of the lower court on grounds interalia:-

> *1. The learned trial magistrate erred infact and in law in finding and holding that the evidence tendered and/or adduced by the Appellant did not show and/or establish evidence of trespass onto the plot Number 117, isolated, situtateed within keroka Town belonging to and registered in the name of Laban Mokamba now deceased.*
>
> *2. The learned trial magistrate failed to comprehend, appreciate and correctly apply the evidence adduced by the appellant(that is, both oral and documentary) and thereby same missed the avix of the Appellants case, which was before her for determination.*
>
> *3. The learned trial magistrate addressed and/or dealt with the evidence in a stated manner and thereby failed to discern the issues in disputes a result of which, the learned trial magistrate abandoned and/or abdicated her judicial responsibility to adjudicate on the dispute laid before the Honourable court.*
>
> *4. The learned trial magistrate erred in law in finding and holding that the appellant's suit was resjudicata, inso far as similar issues had (sic) been raised, canvassed and determined vide Kisii HCC.NO. 260 of 1988, which holding was contrary to and not supported by the evidence on record.*
>
> *5. In finding and holding that the Appellant's suit was resjudicata, the learned trial magistrate, by a side-mind and without jurisdiction sat on Appeal and/or reviewed a decision of a court of co-ordinate jurisdiction which had held that the Appellant's suit was not resjudicata, while dealing with a preliminary objection mounted by the respondents.*
>
> *6. The judgment and/or decision of the learned trial magistrate has creased and/or generated the existence of two(2) conflicting and/or contradictory orders (sic) on the issue of resjudicata. Consequently, the judgment herein has occasioned a miscarriage of justice.*
>
> *7. The learned trial magistrate erred in fact and in law in failing to property or at all analyse,*

*evaluate and consider, the totality of evidence (oral and documentary) adduced by the Appellant and witnesses. Consequently, the trial court arrived at a conclusion contrary to the evidence in record.*

*8. The learned trial magistrate failed to properly evaluate and/or analyze the submissions tendered by the Appellant and the authorities cited thereto. Consequently, the learned trial magistrate misapprehended the …..of the matter before the court.*

*9. The judgment by the learned trial magistrate is devoid of issues for determination and the reasons for such determination. Consequently, the judgment is fatally deficient and contrary to the provisions of order 21 Rule 4 of the Civil Procedure Rules, 2010.*

18. Thus the appellant prays the court for the following orders:

*a. The Appeal herein be allowed and the judgment and decree of the trial magistrate dated 20th October, 2012 vide Keroka SRMCC.NO. 275 of 2010, be set aside, reviewed, varied and/or quashed.*

*b. The Honourable court be pleased to substitute therefore an order allowing the Appellant's suit in the subordinate court vide Keroka SRMCC.NO. 275 of 2010.*

*c. Costs of this Appeal and costs incurred in the subordinate court be borne by the respondents.*

*d. Such further and/or other relief be granted as the court may deem expedient.*

19. When the matter came before Sitati, J on June, 2014 it was agreed amongst other directions that the above appeal be argued by filing and exchanging written submissions to be filed within 60 days. When the matter came before me on 12th November, 2014 only the appellant had filed their submissions. I have read the said submissions by the appellant and considered them.

20. This is a first appeal, and that being so I am required to re-evaluate the evidence and arrive at my own independent finding and conclusions on the matter. Upon re-evaluating the pleadings, the oral evidence, judgment of the lower court and the memorandum of appeal the issue to determine in this matter was whether or not the appellant's case in the lower court was resjudicata. Before determining whether the appellant's case was resjudicata, it is necessary for this court to establish the meaning of resjudicata. Section 7 of the Civil Procedure Act Chapter 21 Laws of Kenya provides that:-

*"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?*

21. This doctrine has been applied in a number of cases including; James Kababazi and 21 others vs. the Attorney General of the Republic of Uganda EACJ where the court stated that for the doctrine to apply:

- *There matter must be directly and substantially in issue in the two suits.*
- *The parties must be the same or parties under whom any of them claim, litigating under the same title; and*
- *The matter must have been finally decided in the previous suit (**see Uhuru Highway Development Ltd vs. Central Bank & 2 others- Civil Appeal No. 36 of 1996**).*

22. In addition to this, the Blacks law Dictionary defines resjudicata as:-

*"a thing adjudicated. An issue that has been definitely settled by judicial decision….?*

*In the present case can we say the appellants case in the lower court was resjudicata?*

23. In Civil Suit No. 260 of 1998 the plaintiff was Bigogo Kebaso (who was the respondents father now deceased) and the defendant was Laban Mokamba(who is the appellant's father who is also now deceased) and both appellant and respondent have acknowledged the fact that they are now the legal administrators of the deceased estate.

24. By a consent issued on 28th February, 1989 it was held:-

1). That in execution of the order of this court dated 31st January, 1989 the instructions of fixing boundaries were carried out by realigning the plots as hereunder:-

*1. Bigogo Kebaso Plot 'A' measures 100ft by 50ft.*

*2. Laban Mokamba Plot 'B' measures 100ft by 25ft.*

*3. Momanyi Clement Plot 'C' measures 100ft by 25ft.*

*4. Plot D,E and F were left vacant for re-allocation to the owners as soon as the report to clerk of the council.*

2)……………………………………

3) That Mr. Bigogo be and is hereby ordered to demolish his existing front building to facilitate proper planning and survey work and put up a commercial building and not residential.

4) That Mokamba Laban be and is hereby ordered to demolish his uncompleted residential building to give way for proposed realignment and put up a commercial building and not a residential building. The area involved in the dispute is for commercial purposes?

26. From the evidence adduced by both parties i.e. the appellants and the respondents both parties acknowledge the fact that both plots i.e. the suit premises and Plot No. 129 (***which was owned by respondents father***) are adjacent to one another and therefore share a boundary. It goes without saying therefore that in Civil Suit No. 260 of 1998 the appellant and respondents deceased's fathers had an issue with boundary determination and thus by consent. Hon. V.V. Patel recorded a consent whereby the streamlining of boundaries was ordered and both deceased were ordered to demolish their existing structures on their land in order to facilitate proper planning and survey work to put up a commercial building.

27. Thus we can say that the appellant's case essentially deals with the same parties though they are both dead their beneficiaries are furthering the deceased's interest but most importantly it touches on an issue of boundaries and when at paragraph 6 of the appellant's case he contends that the respondents destroyed the entire fence surrounding the suit premises this clearly deals with boundaries.

At this juncture, I would have expected the appellant to adduce evidence that surveyors were actually called and clear beacons were set out streamlining where exactly the suit premise starts and ends thus establishing to the court that indeed the respondent was guilty of trespassing on the suit premises.

28. Instead the appellant has not indicated where his boundary is in relation to the respondents land which is adjacent to him, no evidence was adduced by a land surveyor on behalf of the appellant demonstrating how the boundaries were set out and most importantly how the respondent trespassed in the suit premises owned by the appellant's father.

29. In my humble view therefore, I am inclined to agree with the learned trial magistrate's judgment on

this matter that this case is indeed resjudicata as I have demonstrated above that the case involved the same parties i.e. their legal representatives, the same matter deals with boundaries and from the consent as recorded in Civil suit No. 260 of 1988 it was dispensed with on 8th June, 2006 but since none of the parties has actually implemented the content of the said consent, no wonder one of them has decided to come back to this court to decide on an issue which had earlier on been decided by this court.

30. Even if I were to rule that this matter was not resjudicata, where is the evidence from the land surveyor determining that indeed boundaries were determined and it is indeed the respondent who has interfered with the boundaries and trespassed on the appellant's land? The appellant must always remember that if he makes certain averments against the respondent, the incidence of the legal burden is upon him to prove that averments. The same has been stated in Halbury's Laws of England, 4th Edition Vol. 17 paragraph 14 which states:-

> *'Incidence of legal burden…..in respect of a particular allegation, the burden lies upon the party for whom the substantiation of the particular allegation is an essential of his case?*

31. In the circumstances therefore the appellant's case being resjudicata **MUST** be dismissed. I uphold the learned trial magistrate judgment and decree and dismiss the above appeal for lack of merits. The appellant is thus condemned to pay for costs for this appeal and the lower court.

Dated and delivered at **KISII** this 26th day of January, 2015

**C.B. NAGILLAH,**

**JUDGE.**

**In the presence of:-**

Ochwangi present for the appellant

Respondents are in person.

Edwin Mongare Court Clerk.