REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU Civil Case 106 of 2008

EUTYCHUS MUTHUI .....PLAINTIFF

VERSUS

GEOFFREY KIRIMA IGWETA .....1ST DEFENDANT
STEPHEN GITONGA.....2ND DEFENDANT

RULING

The plaintiff sued both defendants seeking for a declaration that L.R. Number *Nyaki/Kithoka/1725* was fraudulently, wrongly, irregularly and illegally transferred to the 2nd defendant. He therefore sought that the court will order the rectification for the register to reflect the plaintiff's name as the owner. The 2nd defendant has by Chamber Summons dated 23rd December 2008 sought for the dismissal of this suit on the basis that it is *res judicata.* The 2nd defendant stated that he is the registered owner of the suit property. That the plaintiff and the first defendant in an attempt to defeat his right over the suit property entered into a consent in HCC No. 116 of 1996. Amongst other things, the consent annexed to the 2nd defendant's affidavit shows that the plaintiff and the first defendant in that suit agreed to have the suit property registered in the plaintiff's name. The consent was made into an order of the court in HCC No. 116 of 1996 on 17th October 1997. it is not clear what the cause of action was in that case since the parties did not bring to my attention the pleadings. It is however clear that the suit was only between the plaintiff and the 1st defendant. The 2nd defendant was not a party. The 2nd defendant after that consent by the plaintiff and the 1st defendant filed a case in the Chief magistrate Court Meru being CMCC No. 929 of 1996. The 2nd defendant in that action sought orders for specific performance against the 1st defendant. The second defendant sought that the 1st defendant would be ordered to transfer the suit

property in furtherance to the agreement for sale. The judgment of the court of 22nd November 2006 in that case, was to the effect that the 1st defendant should refund to the 2nd defendant Kshs. 465,000/=. It ought to be noted that the plaintiff in this case was made a party in that case on his own application. That is, he became a party in CMCC No. 929 of 1996. It now seems that the 1st defendant after that judgment was unable to refund the 2nd defendant as ordered by the court. It seems that the 1st and 2nd defendants entered into an agreement that instead of the refund, the 1st defendant was to transfer and did infact transfer the suit property to the 2nd defendant. Whereas that agreement to transfer the property to the 2nd defendant did not involve the plaintiff herein, the plaintiff did become aware of it and participated in an application in that case by the first defendant where the 1st defendant was seeking for the court to grant leave to the land registrar to dispense with the requirement of the original title document. The plaintiff in response to that application filed an affidavit in reply. The court by its ruling of 18th June 2008 granted leave for the dispensation of the requirement of the original title by the land registrar. That is when the transfer of the suit property was effected and the 2nd defendant became the registered owner of the suit property. The plaintiff on being joined as a party in CMCC 929 of 1996 he did not file a counter claim or any other pleadings on his own behalf. He however fully participated in the trial. He was represented by counsel throughout the proceedings of that case. After judgment was delivered ordering the 1st defendant to refund the 2nd defendant as stated above, and where also the court found that the plaintiff had failed to file any claim, the plaintiff did not file an appeal against that judgment. He also did not file an appeal against the order to dispense with the requirement by the land registrar of the original title document to enable transfer to the 2nd defendant's name of the suit property. It is on the basis of that suit that is CMCC No. 929 of 1996 that this case is sought to be struck out. This suit is sought to be struck out on the basis that it is *res judicata*. The plaintiff in response to the application to strike out his suit filed a replying affidavit. He argued in response to the application that the chief magistrate court in CMCC No. 929 of 1996 found that he was not entitled to any claim. Therefore he was of the view that the doctrine of *res judicata* could not apply. The learned magistrate in his judgment in that CMCC case number 929 of 1996 had this to say:-

"This party (plaintiff in HCC No. 106 of 2008) did not file any pleadings and/or put in a

cross –suit. He only stated that he was protecting his interest, whatever those are. Pleadings are the basis by which a party gets a chance to show his cause of action, if any. A party then becomes bound by his pleadings, so that he will not be allowed to bring in any extraneous matters not pleaded. So, what happens to a party who does not file any pleadings? What happens to his testimony? What happens when his counsel makes no attempt to file any submissions to shed some kind of light on this rather unusual turn of events. I make a finding that the 3rd party (plaintiff in HCC No. 106 of 2008) herein, who is sometimes referred to as the 2nd defendant, is merely a spectator. He has no claim in this suit that can be entertained. His testimony is of no consequence. He may or may not have bought the same piece of land, and he may or may not have paid the consideration in full, and he may or may not have got a consent for transfer, and he even may be in possession, but all that is neither here or there."

It should be noted that the plaintiff himself applied to be joined as a party in CMCC No. 929 of 1996. Even when an objection was raised by the 1st defendant to him being joined as a party, the plaintiff persisted to argue that he needed to be made a party. The court allowed him to be a party. He however on being joined, did not file any papers. Section 7 of the Civil Procedure Act provides as follows:-

"7. No court shall try and 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."

That section provides that when a case is heard by a court and is finally decided, parties are not allowed to re-open such a case. Explanation (1) of that section is relevant to this case. It provides

"The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it."

Explanation (4) is also relevant to this case. It is in the following terms:-

"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

The plaintiff having made himself a party in CMCC No. 929 of 1996 ought to have brought to that court his whole claim for determination. He ought to have brought to court his claim that he entered into an agreement with the first defendant whereby the 1st defendant agreed to sell to him the suit property. In considering the issue of *res judicata* a case in point is **Pop-in (Kenya) Ltd & 3 others Vs. Habib Bank AG Zurich.** The holding of that case was in the following terms:-

"The plea of res judicata applies 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 the parties, exercising reasonable diligence, might have been brought forward at the time."

The court in making decision in the above case also approved the finding of the case of **Hystead and others Vs. Taxation Commissioner, (1925) ALL ER 56** Pg 56 as follows:-

"The admission of a fact of fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started with a view of obtaining another judgment upon a different assumption of fact: Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this was permitted, litigation would have no end, except when legal ingenuity is exhausted. It is principle of law that this cannot be permitted."

The *locus classicus* of that aspect of *res judicata* is the judgment of **Wigram VC In Henderson Vs. Henderson (1843) Hare 100, 115** where the Judge says as follows:-

"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 under special circumstances) permit the same parties to open the same subject of litigation in respect to matter which might have been brought forward as part of the subject in 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 the parties, exercising reasonable diligence, might have brought forward at the time."

The plaintiff faced with the application to strike out his action, relied on the case of **Wachira Waruru & Ano. Vs. Francis Oyatsi**Civil Appeal case No. 111 of 2000 where the Court of Appeal had this to say:-

"Striking out of a defence is a drastic remedy ad it is incumbent upon a judge to give good reasons for doing so. We note with approval what Wilmer L. J. said in the case of Waters Vs. Sunday Pictorial Newspapers Ltd [1961] 2 A11 ER 758 at page 761:-

It is well established that the drastic remedy of striking out a pleading, or part of a pleading, cannot be resorted to unless it is quite clear that the pleading objected to discloses no arguable case. Indeed, it has been conceded before us that the rule is applicable only in plain and obvious cases. It is perhaps not without significant that we managed to spend the whole of the day yesterday in listening to an argument whether or not the matter objected to did set up an arguable case. For the purposes of this appeal, we are not in any way concerned with whether any of the defences raised is likely to be successful. The sole question in relation to each of the four headings is whether the case sought to be set up is so unarguable that it ought

to be struck out in limine. I have come to the conclusion, in relation to each of the four headings, that it is quite impossible for us to take this drastic course."

The plaintiff cannot be heard to say that the 1st and 2nd defendants tried to circumvent course of justice in CMCC No. 929 of 1996 because he participated in the hearing of the application where the land registrar was authorized to carry out the transfer of the land to the 2nd defendant. The plaintiff in his replying affidavit to the application in this matter mentioned the decree in HCC No. 116 of 1996 where he and the first defendant consented to the suit property being transferred to the plaintiff. The order which recorded that consent was made on 17th October 1997. By October 2009, the decree in that case had become time barred by virtue of Section 4(4) of Cap 22. In the case **M'Ikiara M'Rinkanya & Another Vs. Gilbert Kabeere Mbijiwe** Civil application No. Nai 29 of 2003. The Court of Appeal in considering a decree which was 20 years old had this to say:-

"The facts, in short, are that the respondent had a decree against the applicant issued in 1979. The respondent took no action, for one reason or another, on that decree for over 20 years……It is quite clearly arguable that the decree is possibly spent. It is also arguable point that a spent decree may not be executed."

In view of my finding that the plaintiff decree in HCC No. 116 of 1996 is spent and time barred, the plaintiff cannot seek to rely on it. I also find that the plaintiff having been made a party in CMCC No. 929 of 1996 and having participated in that case, the issue of whether the plaintiff had purchased the suit property has already been judged. The plaintiff is therefore precluded from filing the present suit. The general principle of the doctrine of *res judicata* is to ensure that the court do not reach contradictory judgment and is also to stop parties from having multiplicity of judgments. The plaintiff in filing this case when the matter was litigated in CMCC No. 929 of 1996 is also in breach of the overriding objective of the Civil Procedure Act as per Section 1B (1) (c) and (e). The section provides:-

"1(B) (1) For the purpose of furthering the overriding objective referred to in Section 1A, the court shall handle all matters presented before it for the purpose of attaining the following –

(a) …….

(b) ……

(c) The efficient disposal of the business of the court,

(d) ……..

(e) The timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties; and

(f) ……

The overriding objective in Section 1A is in the following terms:-

"1A(1) The overriding objective of this Act (The Civil Procedure Act) and Rules made hereunder is to facilitate the just expeditious, proportionate and affordable resolution of civil dispute of governed by the Act."

In application No. 6 of 2010 **Hunker Trading Company Ltd Vs. Elfoil Kenya Ltd** the Court of Appeal considered the application of a similar section to the section 1B, of the Appellant Jurisdiction Act which is similar to the Section 1B of the Civil Procedure Act, referring to the overriding objective as the double "O" principle or the "O2" or the oxygen principle. The court stated:-

"The applicant is seeking the same orders it declined to obey. We think that we have the jurisdiction to stop it in its tracks in order to attain or further the "O2" principle. We would act unjustly if we were to allow it another chance in this court to defeat the cause of justice by failing to obey an important order of the superior court."

I echo that finding in this case. I too find that I would act unjustly to allow the plaintiff to proceed with this case which is *res judicata* to CMCC No. 929 of 1996. I find that the present suit of the plaintiff is *res judicata* in view of CMCC No. 929 of 1996. I hereby order that this case be struck out with costs being awarded to all the defendants.

Dated and delivered at Meru this 21st day of May 2010.

MARY KASANGO
JUDGE