REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 31 of 2005

DOMINIC ELKAYANI LESORMAT & 336 OTHERS…. APPELLANTS

Versus

MACHAMUKA FARMERS CO. LTD & 17 OTHERS.. RESPONDENTS

JUDGMENT

This appeal is filed by 337 persons who were unsuccessful in setting aside the exparte judgment entered against 18 defendants in SRMCC Nyahururu No. 371 of 1994. The genesis of this matter was that in that case at the lower court Machamuka Farmers Company Limited filed a case against 18 defendants seeking their eviction from LR. NO. 2747 NORTH WEST NANYUKI. Judgment was entered against the said defendants on 12th January 1995. Those defendant sought by an application dated 8th June 1999 to set aside that judgment. That application was dismissed on 21st December 1999. On that dismissal the 337 other persons not parties to the suit filed an application seeking the following orders:-

1. That the honourable court be pleased to order that the interested parties herein be enjoined to these proceedings.

2. That the exparte judgment and decree issued on 12th January 1995 and its consequential orders be set aside.

3. That there by a stay of execution of the decree herein pending the hearing and determination of this application.

That application was met by a preliminary objection raised by the plaintiff which was in the following terms;-

1. That the application is rejudicata. A similar application having been canvassed and adjudicated upon by the honourable court vide its ruling of 21st sept ember 1995.

2. That the honourable court is functus officio and the orders sought are therefore incapable of being granted.

3. That the entire application is mala fide, non starter and grossly redundant.

The learned magistrate in his considered ruling upheld that preliminary objection and found that the application was caught by the doctrine of *res judicata*. In that ruling he stated thus:-

"***The law is that explanation 6 of section 7 of the CPA says that;-***

'***Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall for the purpose of this section be demand to claim under the persons so litigating'***

The applicants therefore were covered in the earlier suit that was heard and determined by a court of competent jurisdiction. This P O therefore carries the day. The effect of a P O is that the entire envisaged suit falls. I grant costs to the Respondents."

The said 337 applicants were aggrieved by that decision and accordingly filed the present appeal. The grounds of appeal are as follows:-

1. THAT the learned magistrate erred in law and fact in upholding the 1st Respondent's Preliminary Objection.

2. THAT the Learned Magistrate misdirected himself in holding that the matter was res judicata.

3. THAT the Learned Magistrate erred in law and in fact in finding that there was no suit.

4. THAT the Learned Magistrate erred in law and in fact in holding that the appellants herein were covered in the earlier suit.

5. THAT the Learned Magistrate erred in Law in failing to enjoin the appellants in the suit in the subordinate court.

6. THAT the Learned Magistrate erred in law that the appellants had notice of the suit by virtue of explanation 6 of section 7 of the Civil Procedure Act.

7. THAT the Learned Magistrate failed to take into the number of families to be affected and condemned unheard.

8. THAT the Learned Magistrate failed to take into account the submissions by the counsel for the appellants.

9. THAT the Learned Magistrate failed to take into account the Principles of natural justice that nobody should be condemned unheard.

Those grounds can in my view be considered together. I find that I am in agreement with the learned magistrate on the issue of the application being *res judicata.* Section 7 of the Civil Procedure Act is clear on what constitutes *res judicata*. *Res judicata* arises where there is an issue that has directly and substantially being in issue and has been determined by a competent court. The same issue cannot be litigated again. Explanation 6 of Section 7 of the Civil Procedure Act quoted herein above is indeed relevant to that application dated 8th December 2004. the authority cited by the respondent in this appeal that is, UHURU HIGHWAY DEVELOPMENT LIMITED vs CENTRAL BANK OF KENYA & 2 OTHERS Civil Appeal No. 36 of 1996, the court of appeal had this to say:-

"***What is before us is: can a matter of interlocutory nature decided in one suit be subject of another similar application in the same suit? Does the principle of res judicata apply to an application heard and determined in the same suit?***

…….. ***There is no doubt at all that provisions of section 7 of our Civil Procedure Act relating to res judicata in regard to suits do apply to applications for execution of decrees but there is no doubt, also,***

that these provisions are governed by principles analogous to those of res judicata.

…… ***There is not one case cited to show that an application in a suit once decided by courts of competent jurisdictions can be filed once again for a rehearing. This shows only one intention on the part of the legislature in India and our Civil Procedure Act. That is to say, there must be an end to applications of similar nature; that is to say further, wider principles of res judicata apply to applications with the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation."***

But over and above that when judgment was entered against the defendants in the lower court the decree that was issued was clearly directed to the 18 defendants in that case. The decree was not directed to the 337 appellants in this appeal. In part the extracted decree provided:-

"***That the defendants are hereby ordered to vacate the plaintiff's parcel of land that is, Parcel No. LR 2747 North west of Nanyuki and in default they be evicted."***

The decree was not directed as stated before against the 337 appellants. The appellants in this case were not to be affected by the eviction of the 18 defendants. This is simply because the 337 appellants were not parties to that suit. That being so the appellants had no basis in law to seek the setting aside of the judgment entered against the 18 defendants. The 337 appellants were strangers to that judgment. There was simply no nexus between the appellants and the judgment. Their prayers to set aside judgment entered against the 18 defendants therefore had to fail. Their prayer to be joined as interested parties also had to fail because judgment having been entered in that cause in the lower court all that remain was execution. There were no legal rights that remained which were yet to be determined to justify or necessitate the joining of the 337 appellants as parties in that cause. The appellants appeal in view of what is stated herein is incompetent and the same is dismissed with costs being awarded to Machamuka Farmers Company Limited.

Dated and delivered this 18th day of December 2008

MARY KASANGO

JUDGE