REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Appeal 82 of 2005

(An appeal from the Ruling of M.S.Khadambi, SRM at Meru delivered on 21.9.2005

being CMCC No.377 of 1998)

JAMES MBAYA M'ICHUNGE …….……. APPELLANT

VERSUS

MBIJIWE IKIARA ……..……. RESPONDENT

JUDGMENT

On 26th July, 1998 the appellant filed a suit against the respondent claiming that he had transferred to the latter 1 acre of land described as No.Abogeta/Upper Chure/1561 in exchange with the respondent's No.Abogeta/Upper Chure/321.

The appellant explained in that suit that the respondent failed to transfer to him No.Abogeta/Upper Chure/321. He therefore sought to have No.Abogeta/Upper Chure/1561 retransferred to him for failure of consideration.

Several years later the respondent filed a motion on notice dated 18th February, 2005 in which he asked the court to dismiss the appellant's suit on the ground that the same was *res judicata*. That the issues raised in that suit are the same ones which had been raised in two other suits, being Nkubu Succession Cause No.5/1976 and HCC No.65/1985.

That those issues were considered and determined finally. Those averments were denied by the respondent in his replying affidavit dated 9th May, 2005. Specifically the respondent stated that the succession cause at Nkubu did not deal with the issues raised in the present suit.

That the issue in the present suit relates to contractual relationship of the parties. Regarding HCCC No.65/1985, the respondent contended that the suit land in that suit was different from that in the present suit and that it dealt with his claim to two acres and not the issue of retransfer of 1 acre which he had transferred to the appellant.

The lower court considered these arguments and in its ruling dated 21st September, 2005 dismissed the suit on the ground that it was *res judicata*. That ruling prompted this appeal. The appellant filed the appeal in person listing five grounds, the effect of which is that the magistrate's court erred in dismissing the suit without considering relevant facts and for failing to allow the case to go for hearing.

In opposing the appeal counsel for the respondent submitted that the appellant's appeal amounts to an abuse of the court process, having litigated on the same subject for nearly 22 years.

I have considered the appeal and the arguments. There have been four matters relating to this particular suit. First there was Succession Cause No.16 of 1975 in which the respondent sought and obtained grant of representation in respect of his late father's estate. Then both the appellant and respondent filed Nkubu Succession Cause No. 5 of 1976 in which the appellant was awarded 5 acres and the respondent one acre of No. U-Chure/53.

Next came HCCC No.65 of 1985 in which the appellant sought an order transferring to him from No.Abogeta.U/Chure/321 two acres, among other reliefs. According to a copy of a decree included in the record of appeal this suit was dismissed with the remarks that the plaintiff(appellant) had no right to demand two acres from the respondent. That was on 22nd September, 1988.

Finally, the appellant instituted the suit to which this appeal relates, HCCC NO.377 of 1988 seeking for a transfer of title No.Abogeta/Upper-Chure/1561 to the appellant, among other reliefs.

The application seeking the dismissal of the suit was brought under Sections 7, 3 and 3A of the Civil Procedure Act, and Order 50 Rule 1 of the Civil Procedure Rules.

A point of law can be raised at any stage of the proceedings. The two succession causes do not form part of the record of appeal. However, from the record it is clear that in Succession 16 of 1975 the respondent was granted letters of administration in respect of his father's estate. Then in 1976 both the respondent and appellant filed Nkubu Succession Cause No.5/1976 where No.Abogeta/U.Chure/53 was distributed between them with the appellant taking 5 acres and respondent one acre. It is also contended by the respondent that after this he registered his one acre parcel as No.Abogeta/U.Chure/1561.

Subsequently the appellant laid a further claim of 2 acres to No.Abogeta/U.Chure/321 vide HCCC No.65/85. That suit was referred to arbitration, was dismissed and judgment confirmed by the court.

In HCCC No.377 of 1988, the suit land is Abogeta/Upper Chure/1561, the parcel that was transferred to the respondent following Succession Cause No.5/1976. To that extent the appellant argues that the suit under consideration was not *res judicata*. The doctrine of *res judicata* is legislated in Section 7 of the Civil Procedure Act as follows;

"7.No court shall try any suit or issue in which the matter directly and substantially in issue has been directly or 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 that court".

It follows from the above that the doctrine of *res judicata* will apply if the present suit involved the same issues and parties as HCCC No.65/1985 and also if the latter was heard and determined on merit. I have called for and looked at HCCC NO.65/1985.

The matter, as I have stated, was referred to arbitration, comprising a panel of elders and chaired by the District Officer. During the hearing of the arbitration the appellant led evidence to the effect that he gave one acre of land to the respondent in exchange of two acres, in accordance with their fathers' wishes before they died.

That the respondent refused to honour his undertaking to transfer to the appellant the two acres hence his suit seeking that his two acres be returned to him.

The arbitrators rejected this claim. In their view the appellant failed to justify his claim of two acres. Instead they were of the view that if indeed one acre is what was transferred to the respondent the appellant was at liberty to demand the retransfer of that.

They said;

"*Why did he insist still demanding the two acres which he is sure is not the right claim. Instead the plaintiff could demand his one acre back. If it was true he gave the defendant one acre"*

The appellant was not pleased with this finding and applied to the High Court to set it aside. Tank, J dismissed that application observing that;

"The applicant who is the plaintiff in the civil suit No.65/1985 claimed two acres of land whereas before this court he states that he wants one acre of land. The appellant has given the evidence before the arbitrators also in a confusing manner, raising doubt in the minds of the arbitrators as to why the claim should be for two acres".

I have carefully looked at HCCC No.377/1988 and I find striking similarities in the averments with those in HCCC No.65/1985, except for the suit property.

In HCCC No.65/1985 the suit property is Abogeta/U-Chure/321 while in HCCC No.377/1988 the land is Abogeta/Upper- Chure/1561. I am tempted to conclude that the appellant filed HCCC No.377/1988 after HCCC NO.65/1985 was dismissed and following the remarks of the arbitrators that he could claim one acre. Otherwise I find no logic in the appellant insisting on retransfer of Abogeta/U-Chure/321 yet what was alleged to have been transferred to the respondent was Abogeta/Upper Chure/1561.

HCCC No.65/1985 was decided on merit and the issues in it are substantially the same issues in the present suit. I am fortified in this finding by the appellant's own words before the D.O and the panel of elders in this very matter (HCCC No.377/88).

He stated;

"*Later in 1985 I sued him in Meru Law Courts wanting him to give me a shamba. He said he had no shamba to give me then the court ruled out that I should sue him again so that he can return to me the one acre which he was given during succession. I sued him and the court directed for an arbitration before the D.O, South Imenti and that is where we are. I would like the defendant to return to me the one acre which was given to him by the court when I had filed a succession case of my father".*

I need not say any more save to emphasis that the land transferred in the succession cause measuring one acre was only Abogeta/Upper-Chure/1561. No useful results different from those in HCCC No.65/1985 will be achieved in the hearing of HCCC No.377/88. The latter is *res judicata*.

The decision of the lower court to dismiss the suit will not be disturbed. This appeal is dismissed with costs to the respondent.

DATED AND DELIVERED AT MERU THIS 27th DAY OF April, 2007

W. OUKO

JUDGE