REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 141 of 2000

JACOB MIRITI.……...…… APPELLANT

V E R S U S

SAMUEL MWANGI…….RESPONDENT

JUDGMENT

1. The Appeal herein was filed by the Appellant in person on 21.12.2002 and is against the decision in PMCC No. 399/1999 (Maua) dated 18.12.2000. The decision contained in that judgment of M.N. Gicheru, S.R.M. was to the effect that the Appellant should be evicted from Land Reference No. Upper Athiru/Gaiti/1890, should be barred by a permanent injunction from interfering with that parcel of land and to pay costs and interest thereon. The memorandum of Appeal which appears undated is a rumbling 8 paragraph piece and Mr. Mwanzia who argued the Appeal upon appointment quite wisely, I think, argued grounds 3 and 4 which raise only one issue; that the subordinate court had no jurisdiction and was estopped from hearing PMCC No. 399/1995 by the doctrine of Res Judicata since the matters in issue had been conclusively determined in HCCA 72/90 (Meru). In support of the Appellant's case, I was referred to the decision in H.C. Succ. Cause No. 259 /1994 (Meru) M'Mwarania Kwaria vs Julius Kathia Kiuju and HCCC 85/2004 (Meru) – Andrew Muguna and 16 others vs Meru Central County Council and 2 others on the applicability of the doctrine of Res Judicata.

2. The only other point in support of the Appeal was that since the land in dispute was in an adjudication section, then failure to comply with s.30 of the Land Adjudication Act was fatal to the suit and it ought to have been struck off.

3. The Response by Mr. Kariuki for the Respondent is that the Appeal has no merit because the pleadings in HCCA 72/90 were not produced before the lower court so that the court was wholly unaware of the issues now being raised. In any event, that the Appeal was not determined on its merits and therefore the docrine of res judicate cannot apply.

4. Further that the issues in the case leading to the Appeal i.e. CMCC 338/89 were different and cannot attach to the present proceedings.

5. As to the consent under s.30 of the Land Adjudication Act, Mr. Kariuki submits that the same was filed together with the Plaint and the suit was therefore properly before court.

6. I should begin by addressing the last point above i S. 30 (1) of the Land Adjudication Cap 284 Act provides as follows:-

"**Except with the consent in writing of the adjudication officer, no person shall institute, and no**

court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29 (3) of this Act".

7. I now gather from my perusal of the Plaint in PMCC No. 399/1995 that in fact land parcel number Upper Athiu/Gaiti/1890 is not registered land but land under adjudication and therefore at the time of filing suit, a valid consent under s.30(1) of the Land Adjudication Act was required. In the Plaint there is no averment, (a desirable practice) that the consent was obtained. I note however that a document marked Exh No. 8 was "**Produced**" in evidence before the trial court. The document is among the Respondent's exhibits but on the notes of the court, there is no reference to it. The document happens to be a consent under s.30(1) aforesaid dated 9.5.1995, the same day the Plaint was filed. The plaint itself is dated 9.5.1995 as well. Much as I am tempted to reject the document and say that no consent was "**obtained prior**" to the filing of the suit, my sense of fairness and justice tells me that since it appears valid and since it is on record and since I should look to the substance of the Appeal and since the issue was never raised in the lower court nor in the grounds of Appeal, I should take the position that indeed a consent was properly obtained and the lower court was properly and lawfully seized of the matter it ultimately made a decision on.

8. Having so held, I should turn to the issue of res judicata. Although this issue was not raised in substanto before the lower court, issues relating to HCCA 72/90 and the prior suit CMCC 398/89 were indeed raised. I say so because in cross-examination by the Appellant, the Respondent is recorded as having said:

"**In case No. 338/89, it is said that the land be transferred to me. In Appeal No. 72/90 it was ordered that the consent was late. The appeal was successful as consent was late. The court did not say that the land belonged to the defendant. This was Meru Civil Appeal No. 72/90."**

9. The Appellant is also recorded as saying:-

"**In 1989 the court heard the case. It said that the beans were mine. It is then that Mwangi sued me in Civil Suit No. 338/89…I decided to appeal in the High Court. In the meantime Mwangi went to the Lands Office. He said that he had worn** *(sic)* **the case. The Land was transferred to him. I appealed in HCCA 72/99…The court set aside the judgment….I was sued again"**

10. The learned trial magistrate at page 2 of his judgment considered the import of the two decisions and said;

"**In my view, the decision of the High Court is per in curam (not binding) because the case did not concern an interest in land. However the two cases are irrelevant to this case."**

11. For my part, I do not have the benefit of having any pleading in RMCC 339/1989 but I have the judgment in HCCA 72/90 which was produced in the trial in the subordinate Court. Ong'udi J. captured the substance of the matters in the Appeal when he said thus:

"**The Respondent sued the appellant in the court below alleging that between 1987 – 1989 the appellant had unlawfully and without any colour of right trespassed into his land and harvested beans there from valued at Ksh.5,400/-.**

12. As to whether those issues were ever adjudicated upon, the learned judge said;

"**On 19th December 1989 the matter came up for hearing in the court below. The learned magistrate heard same evidence from the respondent and stopped the proceedings and made the following order:**

'**Ct: the matter concerns land that is not demarcated and accordingly the court has no jurisdiction to hear such a matter without the consent of the Land Adjudication Officer who is in charge of such**

matters before they are brought to court.

M.M. Rungare – R.M.'

13. Inspite of the above clear orders and for some strange reason, the matter still proceeded for hearing before the same magistrate who rendered a judgment on 21.8.1990. Nonetheless, Ong'udi J. set aside the judgment and stated that the orders of 19.12.1989 "**still stood valid and nothing thereafter appears to have clothed the learned magistrate with jurisdiction and her proceedings were a nullity ab initio.**" He allowed the appeal.

14. I have taken effort to reproduce the issues in HCCA 72/90 because in PMCC 399/1989 subject of this Appeal the issues being addressed were trespass and eviction and the injunction to restrain further trespass. In PMCC 399/1989 the issue appears to have been the beans harvested as a consequence of trespass. The matter in any event received no attention in the Appeal because the proceedings in PMCC 339/1989 were declared a nullity and remain so today. Can res-judicata be invoked in the event that the proceedings are declared a nullity? I submit that it cannot.

15. S.7 of the Civil Procedure Act provides as follows:

"**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."**

Clearly the above section cannot apply in the event of a nullity because a nullity is defined as:

"**characterlessness, ineffectualness, invalidity, nonexistence, powerlessness, uselessness, valuelessness, voidness, worthlessness"- Concise Thesaurus, Collins, 2000.**

16. To bring matters closer to this case, in a nullity no issue can be the same, no parties can be the same, no subject matter can be the same and more importantly in this case, there was no court competent enough to try the case and therefore no final decision was ever given. Res Judicata can in such circumstances be invoked only but in vain. The authorities in M'Mwarania Kwaria (supra) and Andrew Muguna (supra) are not applicable to this Appeal and if they are, then only in the converse.

17. Since I have not accepted the only two arguments raised in this Appeal it follows that the same must and is hereby dismissed with costs to the Respondent.

18. Orders accordingly.

Dated, signed and delivered in open court at Meru this 26th day of April 2007.

ISAAC LENAOLA

JUDGE

In The Presence Of

Mr. Mwanzia Advocate for the Appellant

N/A Advocate for the Respondent

Respondent present.

ISAAC LENAOLA

JUDGE