



**Hapu v Parkike & another (Environment and Land Appeal 19 of 2019)
[2022] KEELC 15482 (KLR) (21 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15482 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND APPEAL 19 OF 2019
CG MBOGO, J
DECEMBER 21, 2022**

BETWEEN

GEORGE LATON HAPU APPELLANT

AND

IKOTE OLE PARKIKE 1ST RESPONDENT

AGRICULTURAL FINANCE CORPORATION 2ND RESPONDENT

*(Being an appeal from the judgment delivered by the
Honourable W. Juma, Chief Magistrate on 7th August, 2019)*

JUDGMENT

1. The appellant herein being aggrieved by the judgment of Hon W. Juma, Chief Magistrate, delivered on August 7, 2019 in Narok CMCC No. 39 of 2018 appealed to this court vide a memorandum of appeal dated August 27, 2019 against the whole decision on the following grounds: -
 1. That the learned Magistrate erred in law by failing to have due regard, take into account and appreciate the substantive issue of law and fact raised by the appellant's counsel during the hearing of the main suit and in the submissions, authorities and other documents on record.
 2. That the learned magistrate erred in law and fact for not recognizing that the appellant was a bona fide purchaser for value of the suit property.
 3. That the learned magistrate erred in law by not taking into account that there existed CMCC 102 of 2010-Ikote Ole Parkike versus Agricultural Finance Corporation that was compromised by a recorded consent.



4. That the learned magistrate erred in law and in fact for not taking into account CMCC No. 54 of 2013-George Laton Hapu versus Ikote Parkire in which the issue of ownership was determined.
 5. That the learned magistrate erred in law by sitting on an appeal against an order of a court of equal status as made in CMCC No. 54 of 2013, George Laton Hapu versus Ikote Ole Parkire.
 6. That the learned magistrate erred in law for deciding issues that derive the effect of being *res judicata*.
 7. That the learned magistrate erred in law and in fact by disregarding the rights of the appellant.
 8. That in all the circumstances of the case, the learned judge failed to render justice to the appellant.
2. The appellant therefore prays for: -
- a. This appeal be allowed.
 - b. The judgment delivered on the August 7, 2019 be set aside in its entirety.
 - c. The appellant's interest in the suit property is valid and that the appellant is the legal and duly registered owner of the suit property.
 - d. The costs be borne by the respondent.
3. The appellant and the 1st respondent filed their respective written submissions and highlighted the same on 1 October 9, 2022. The 1st respondent filed written submissions dated May 20, 2022. The appellant filed written submissions dated October 6, 2022. The 1st respondent filed his supplementary written submissions dated October 13, 2022.
4. During highlighting of their written submissions, the counsel for the appellant submitted that they raised two issues for determination as follows:-
- a. Whether the lower court had jurisdiction to hear and determine the suit.
 - b. Whether the court disregarded the right of appeal.
5. On the first issue, the counsel submitted that they have placed emphasis on the doctrine of *functus officio* as demonstrated by the various authorities cited and the appellant was able to satisfy that the two prerequisites i.e. whether the decision was final and that it has to bear both the substantive and formal aspects on the issue of substantive finality. The counsel relied on civil suit no. 54 of 2013 which was before the learned Resident Magistrate which parties are similar to this matter. The counsel submitted that the learned Resident Magistrate substantively satisfied the matter when he awarded the suit property to the appellant and directed issuance of the title deed. That on the formal process, the learned Resident Magistrate dealt with the matter as per the pleadings and substantively made a determination.
6. On the issue of *functus officio*, the counsel submitted that the learned Magistrate had jurisdiction to determine as she did and that as per the civil suit no. 54 of 2013, the court entered judgment and delivered vacant possession. The counsel relied on the cases of *Jersey Evening Post Limited v Al Thani* [2002] JLR 542 at 550 and *John Gilbert Ouma v Kenya Ferry Services Limited* [2021] eKLR. The counsel further submitted that given that the respondent did not comply with the order, they moved the learned Resident Magistrate and the court noted that the orders were already in place to have the



suit property and it was only fair that the orders of the court are enjoyed by the appellant. Further, that on July 17, 2013, the court gave vesting orders and the suit property was registered in the name of the appellant. Further that orders were set aside a bit too late where the 2nd defendant sought to file a defence out of time. His application was allowed and no orders touching on the proprietary of the suit property was canvassed given that the title deed to the suit property was issued on August 15, 2013. The counsel further submitted that on April 16, 2014, the matter was to proceed for hearing and the counsel for the appellant raised objection to the proceedings arguing that the court had become functus officio and the counsel appearing for the 2nd defendant acceded to that fact and consequently, the court declared itself functus officio and suggested to the 1st defendant to proceed to the high court as is captured in page 264-265 of the record of appeal. Reliance was placed on the case of *Raila Odinga & others v IEBC & others* [2013] eKLR. The counsel submitted that the only way the Magistrate Court could have entertained the suit was if the proceedings were brought under the “slip rule” as it had rendered itself on the issue of the suit property and ownership and the only available remedy to the 1st respondent was to prefer an appeal given that a title deed had been issued. The counsel relied on the cases of *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* [2017] eKLR and *Steve Onyango v Techspa General Supplies Limited & 2 others* [2020] eKLR.

7. The appellant’s counsel further submitted that the court therefore had no jurisdiction to issue the orders made in ELC Case No.39 of 2018.
8. On the second issue, the counsel submitted that the appellant is an innocent purchaser for value through a creditor exercising its statutory power of sale and his rights were never protected by law and the exception of apparent fraud and misconduct do not apply here. The counsel relied on the cases of *Nationwide Finance Company Limited v Meck Industries Limited* [2005] eKLR, *Scholastica Nyaguthii Muturi v Housing Finance Company of Kenya & another* [2017] eKLR and *Simon Njoroge Mburu v Consolidated Bank of Kenya* [2014] eKLR.
9. The counsel further submitted that the respondent cannot rely on the said exceptions as they did not plead. The counsel further submitted that regarding the issue of estoppel, the 1st respondent was served with the relevant notices during the hearing of the suit and cannot claim that he had no knowledge of the sale of his suit property and further cannot come back to claim that his parcel of land is not the one that was auctioned. That the issue of the correct parcel number is a typo and as such, judgment in ELC No. 39 of 2018 should be set aside in entirety. Reliance was placed in the cases of *Banning v Wright* (1972) 2 All ER 987, *Sita Steel Rollings Mills Limited v Jubilee Insurance Company Limited* [2007] eKLR and *Serah Njeri Mwobi v John Kimani Njoroge* [2013] eKLR.
10. The counsel for the 1st respondent submitted that the judgment of the trial court should be sustained based on the evidence before it. The counsel submitted that case no 54 of 2013 is not properly articulated before this court and that Kullow, J in the course of the hearing transferred ELC no. 458 of 2017 to the subordinate court for hearing and determination in the presence of both parties and no objection was raised. Further that the only witness who gave evidence before the trial court was the appellant and the court was not functus officio and this issue is being raised too late in the day.
11. The counsel further submitted that the question is what property was sold and transferred. That as per the record of appeal, the notification of sale refers to property 372 instead of 327, the 45 days redemption of notice refers to 372. The advertisement and the memorandum of sale and the auctioneers certificate of sale refer to 372. The counsel further submitted that during his evidence, the appellant is on record as having referred to 327 and he wanted parcel number 372. Further, that the 1st respondent was aware that his farm was not auctioned and realized upon conducting a search, that his land was registered in the names of someone else. The counsel further submitted that the record of appeal at



page 151 has particulars of fraud that cannot be called a typographical error to be treated casually. Further, that the 1st respondent right of redemption had not been extinguished because the process was not valid and the security was not realized. The counsel submitted that the typo was supported by the evidence of the 2nd respondent who admitted that the land that was sold was different from what they had as security. The counsel further submitted that the authorities relied on by the appellant are distinguishable and should be disregarded. The counsel relied on the cases of *Alberto Mario Cordeiro & another v Visbram Shamji* [2015] eKLR and *Susan Adoyo v Equity Bank (K) Limited* [2021] eKLR.

12. In reply, the counsel for the appellant submitted that on the issue of the correct title, he will make reference to page 303 where the plaintiff in ELC 39 of 2018 acceded that he was indebted and the suit property was ripe for redemption and the face of the documents clearly capture the 1st respondent as the owner of the suit property. On the issue of transfer of the suit, the counsel further submitted that jurisdiction can only be donated by the *Constitution* or the statute and courts have held that the issue of jurisdiction can be raised at any stage even on appeal. The counsel relied on the case of *Constructive Joseph LLP v AG* [2022] eKLR.
13. This being the first appellate court, I am required to re-evaluate evidence adduced before the trial court and make an independent determination. This I do with the knowledge that unlike the trial court, I did not get the benefit of taking evidence first hand. For this reason, I will give due allowance but most importantly, I will endeavor to subject the evidence tendered before the trial court to fresh scrutiny and at the end determine whether the trial court arrived at a just determination. The principles guiding the first appellate court were set out in the case of *Selle & another v Associated Motor Boat Co. Ltd & others* (1968) EA 123 where the court stated as follows: -

“...An appeal to this court from the trial court is by way of retrial and the principles upon which the court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”.
14. Upon consideration of the materials presented in respect of the appeal herein, the following are the issues for determination:
 1. Whether the Judgement in Narok ELC Case No. 39 of 2018 dated the August 7, 2019 should be set aside.
 2. Who should bear the costs of the Appeal.
15. A perusal of the record shows that the appellant herein filed suit against the respondents in Civil Suit 54 of 2013 at the Magistrates’ Court in Narok and on April 16, 2014, the court observed that it lacked jurisdiction and informed the 2nd respondent herein to seek remedy in the High Court. The 2nd respondent moved to the High Court in Nakuru and filed civil suit number 44 of 2014 which court transferred the matter to the ELC court on November 22, 2016. The file was then transferred to Narok and allocated ELC case number 458 of 2017. The hearing of this case commenced in this court before my brother Kullow J, where the plaintiff and the 1st defendant testified and on April 17, 2018, this court noted that the jurisdiction of the case lies with the Magistrates’ Court and transferred the same to the Magistrates’ Court.
16. At the Magistrates’ Court, this matter was allocated ELC case no. 39 of 2018 and the counsel for all the parties by consent agreed that the matter do proceed from where it had reached. The trial court then took the evidence of the appellant herein who was the second defendant.



17. I have perused the proceedings in civil case 54 of 2013 and a number of activities took place. First, the lower court vide its ruling dated June 19, 2013, gave vacant possession of property known as Cis-Mara/Nairagie Enkare327 to the appellant and costs of the application dated 27th May, 2013. The application was seeking for orders to strike out the 1st defendant's statement of defence, summary judgment in favour of the appellant as against the respondents and costs of the suit. A further perusal shows that the appellant filed a notice of motion application dated July 17, 2013 seeking removal of caution and restriction of property known as Cis-Mara/Nairagie-Enkare/327, eviction of the 2nd respondent from the suit property and costs of the application which was allowed as prayed.
18. The 2nd respondent filed an application dated October 23, 2013 seeking orders to set aside orders issued earlier and be allowed to file a defence out of time among other orders. On December 18, 2013 the lower court in its ruling set aside the ex parte judgment against the 2nd respondent and granted 14 days to file and serve a defence. On April 16, 2014, the court downed its tools for want of jurisdiction and marked the file as closed.
19. The way I understand the appellant on the first issue in their submissions is that the trial court sat on an appeal of the decision made by Hon. S Abdul in Civil Suit No. 54 of 2013. I have made a cursory look at the appellant's submissions culminating to the decision of the trial court and the appellant made submissions that the civil suit 54 of 2013 was brought to final conclusion and the only recourse that was available to the 1st respondent was to appeal to the High Court.
20. The doctrine of res judicata is set out in section 7 of the *Civil Procedure Act*. The doctrine ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.
21. A close reading of Section 7 of the Act reveals that for the bar of res judicata to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. I place reliance in the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR where the Supreme Court stated: -
"The doctrine will apply only if it is proved that:
 - i. The suit or issue raised was directly and substantially in issue in the former suit.
 - ii. That the former suit was between the same party or parties under whom they or any of them claim.
 - iii. That those parties were litigating under the same title.
 - iv. That the issue in question was heard and finally determined in the former suit.
 - v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit."
22. Having perused the proceedings in civil suit 54 of 2013 as earlier pointed out, and while I place reliance on the above cited authority, it is my humble view that civil suit 54 of 2013 was not res judicata as the parties' evidence was never subjected to the test of examination in chief, cross examination and re-examination. That would mean that the matter was not subjected to trial to say that it was heard and determined. I do also note that in civil suit 54 of 2013, the subordinate court vide an application filed by the 1st respondent, the court set aside ex parte judgment entered against it and granted the 1st respondent leave to file a defence. Thereafter, the matter was marked as closed for want of jurisdiction. In my opinion, the status of civil suit was marked as closed with issues that were not settled and by its last ruling dated April 16, 2014 the status of the matter was that parties were to revert to the position,



they were earlier. That is to say that there was no summary judgment in place. In my humble view, the trial court did not sit on an appeal of the Hon. Z. Abdul. It therefore cannot be said that the trial court offended the doctrine of *functus officio* since parties were taken back to the position they were before based on the ruling delivered on December 18, 2013 and subsequently the ruling delivered on April 16, 2014.

23. On the second issue, counsel submitted that the appellant is an innocent purchaser for value having acquired the same through public auction. However, a look at the documents produced by the 1st respondent indicate that he had been making payment towards the loan as is evidenced from the receipts. The payments were made in Naivasha and the Narok office as well. There is also a receipt dated November 29, 2012 which is payment of discharge of securities of fees. How then was it possible for the 2nd respondent to proceed with the auction with the full knowledge that the 1st respondent had completed paying his loan facility? I am hesitant to interfere with the decision of the trial court for in my opinion, the decision was reasonable and fair. I am certainly concerned as to why the appellant did not seek recourse as against the auctioneers because in my view, they engaged in an unlawful and irregular exercise.
24. Based on the foregoing, I find that the memorandum of appeal dated August 27, 2019 lacks merit and the same is dismissed. Each party to bear its own costs. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL on this 21ST day of DECEMBER, 2022.

HON. MBOGO C.G.

JUDGE

21/12/2022.

In the presence of:

CA:Chuma

