



**Isingi v Wambua (Environment and Land Appeal 24 of 2020)
[2024] KEELC 3942 (KLR) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 3942 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 24 OF 2020**

CA OCHIENG, J

MAY 2, 2024

BETWEEN

DAUDI ISINGI APPELLANT

AND

JOSEPH MUTHINI WAMBUA RESPONDENT

*(Being an Appeal from the Ruling of Machakos Chief Magistrate’s Court in Civil
Suit No. 214 of 2016 delivered on 16th June, 2020 by Hon. C.A. Ocharo (PM))*

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated the 23rd June, 2020, the Appellant appealed against the Ruling delivered by Hon. C. A. Ocharo (PM). The genesis of this Appeal is the Ruling of the Chief Magistrate’s Court at Machakos in Civil Suit No. 214 of 2016 by the Hon. C. A. Ocharo PM, delivered on 16th June, 2020, where the trial court proceeded to dismiss the Appellant’s Notice of Motion Application dated the 18th December, 2019 and filed on 20th December, 2019.
2. The Appellant being dissatisfied with the whole of the said Ruling filed a Memorandum of Appeal dated the 23rd June, 2020 which contains the following grounds: -
 1. That the learned Magistrate erred in both law and fact in failing to note and appreciate the fact that the Appellant herein was sued in his capacity as the administrator and legal representative of the estate of Isingi Kikumbi Kamal (Deceased).
 2. That the learned Magistrate erred in both law and fact by failing to note and appreciate that the said Isingi Kikumbi Kamala (Deceased) had previously been sued by the Respondent herein over the same subject matter in MACHAKOS Chief Magistrate’s Court Civil Suit Number 1026



OF 2004 (JOSEPH Muthini Wambua –vs- Isingi Kikumbi Kamala) and that the proceedings in CMCCC 214 of 2016 amount to Res judicata.

3. That the learned Magistrate erred in both law and fact in failing to note and appreciate that the Appellant herein holds a Grant of Letters of Administration Intestate in his favour regarding the estate of Isingi Kikumbi Kamala.
4. That the learned Magistrate erred both in law and fact in failing to note and appreciate that Land Parcel Number Mwala/Mango/1233 was the subject in Machakos Chief Magistrate Civil Suit Number 1026 of 2004 and that the same parcel of land is the subject in impugned proceedings herein (Machakos Chief Magistrate Civil Suit Number 214 of 2016), in which same reliefs had been sought by the Respondent.
5. That the Learned Magistrate erred in both law and fact in failing to note that the suit, Machakos Chief Magistrate’s Court Civil Suit Number 1026 of 2004 was heard and consequently dismissed with costs to the Defendant therein (Isingi Kikumbi Kamala - deceased) and that the Appeal instituted therefrom, MACHAKOS HCCA NO. 18 OF 2006 (Joseph Muthini Wambua –VS- Isingi Kikumbi Kamala) was withdrawn by the appellant therein.
6. That the Learned Magistrate erred in both law and fact in failing to note and to appreciate the fact that the Appellant herein had not attended to the hearing of the suit owing to failure of his advocates then on record as representing him, to inform him of the hearing date(s).
7. That the Learned Magistrate erred in both law and fact in failing to note and appreciate that the Appellant should not be held liable and made to suffer owing to mistakes and/or oversights on the part of his advocates then on record as misrepresenting him.
8. That the Learned Magistrate erred in both law and fact in failing to note and appreciate that there was material non-disclosure of the facts on the part of the Respondent which would have given a different hearing on the impugned proceedings and the Ruling therein.
9. That the Learned Magistrate erred in both law and fact in failing to note and appreciate that the *exparte* Judgment dated and delivered on 11th September, 2018 ought and should be set aside and the Appellant herein (the Defendant in the trial court) given a chance to raise weighty issues as highlighted in his defence on record.
10. That the Learned Magistrate erred in both law and fact in failing to note and appreciate that the Appellant’s Application filed on 20th December, 2019 was NOT a replica of a prior Application by the Appellant filed on 17th July, 2019.
11. That the Learned trial Magistrate erred in both law and fact in failing to note and appreciate the fact that Machakos CMCC 1026 of 2004 (Joseph Muthini Wambua –VS- Isingi Kikumbi Kamala) was concluded owing to a successfully prosecuted Preliminary Objection on the part of the Defendant and that the Respondent’s step of filing a replica suit (Machakos CMCCC NO. 214 OF 2016) against the legal representative of the Estate of Isingi Kikumbi Kamala (deceased) amounts to res-judicata.
12. That the Learned Magistrate erred in both law and fact in failing to note and appreciate that the Appellant’s decision of changing advocates was not a factor to consider in determination of the Application filed on 20th December 2019 and that the same cannot be construed to be an abuse of the Honourable Court’s process.



13. That the Learned Magistrate erred in both law and fact in failing to note and appreciate that the Appellant herein had by dint of the Application filed on 20th December, 2019 distanced himself from his former advocates then on record as well as their actions and omissions and he should therefore not suffer loss and damage owing actions and omissions of his former advocates, who were but his agents and whose actions and omissions he does not ratify.
14. That the Learned Magistrate erred in both law and fact in failing to note and appreciate that Res-judicata as well as lack of disclosure thereof is a potent ground and/or reason to have set aside the impugned ex-parte Judgment and subject it to review proceedings.

Reasons Wherefore the Appellant prays:-

- a. That this Appeal be allowed.
 - b. That the trial court's Ruling dated and delivered on 16th June, 2020 be set aside, and be substituted with a decision in favour of the Appellant, and that the ex parte Judgment dated and delivered on 11th September, 2018 be set aside and the appellant herein be allowed to defend the suit (Machakos CMCC NO. 214 OF 2016) and to prosecute his Statement of the Defence therein dated 6th May, 2016.
 - c. That the costs of this Appeal and the court below be paid by the Respondent.
 - d. That any other relief that this Honourable Court may deem just and fit to order in favour of the Appellant.
3. The Appeal was canvassed by way of written submissions.

Submissions

4. The Appellant in his submissions contended that the suit in the Lower Court was res judicata as it involved the same parcel of land, was litigated by same parties, hence there should not have been any other suit as the initial suit was dismissed with costs. On whether mistake to Counsel should not be visited upon an innocent litigant, he relied on Article 159 of *the Constitution* and contended that there was a Statement of Defence on record but the previous Counsel failed to prosecute the suit, leading to the ex-parte Judgment entered against him. To buttress his averments, he relied on Section 7 of the *Civil Procedure Act* 2010 as well as the following decisions: *Clement Wekesa Muuyi & Another v Patrick Wekesa Okumu (Sued as representative of the Estate of Okumu Masai (deceased))* (2019) eKLR; *Belinda Muras & 6 Others vs Amos Wainaina* [1978] KLR and *Philip Chemwolo & Another v Augustine Kubende* (1982 – 88) KLR 103.
5. The Respondent in his submissions argued that the lower court suit was not res judicata as the previous suit was related to an easement/road to access the suit land whereas the present suit had nothing to do with any easement. He submitted that the previous suit being Machakos CMCC No. 102 of 2004, was dismissed on a point of law as the matter was not heard on its merit. On setting aside of the said Judgment, he contended that the delay had been inordinate as the trial court had considered the Respondent's Defence in the impugned Judgment. To support his averments, he relied on the following decisions: *Kennedy Mokuia Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende* (2022) eKLR; *Mohammed Shally Sese (Shah SESE) v Fulson Company Ltd & Another* [2006] eKLR and *Chemilabs v Lalji Bhimji & Shamji Jinabhai Patel* Nairobi HCCC No. 1062 of 1973 and *Kholi & Others v Bachualal Popatlal* (1964) EA 219 at 229.



Analysis and Determination

6. Upon consideration of the very many grounds set in the Memorandum of Appeal, Record of Appeal and rivalling submissions, the following are the issues I can decipher for determination:-
 - a. Whether the Application dated the 18th December, 2019 filed in the lower court was res judicata.
 - b. Whether the Lower Court suit was res judicata.
 - c. Whether the Appeal is merited.
7. Before I make a determination of the issues raised above, I wish to provide a brief background of the dispute herein; The original suit being Machakos Chief Magistrate's Court Civil Suit No. 214 of 2016 was filed by the Respondent, Mr. Joseph Muthini, claiming to be the registered owner of the suit land known as MWALA/MANGO/1233 and sought injunctive reliefs as well as declaratory orders over the said property, as against the Appellant.
8. The Appellant opposed the suit, vide a Statement of Defence dated the 6th May 2016, wherein it contended that the Respondent had only purchased land measuring 40ft by 100ft, out of the said suit land from his father, and that he had later requested to buy the extra portion of the same land but his father declined to accept the proposal. Further, that the Respondent unlawfully and fraudulently caused the entire land including the two strips of land, which are in dispute herein, to be registered in his name. The Appellant had also argued that when his father protested against the encroachment, the Respondent had filed Machakos CM Suit No.1026 of 2004 which was dismissed with costs. Further, subsequently, the Respondent lodged a complaint against his father, before the Land Disputes Tribunal, which ruled in the Respondent's favour. The matter proceeded for hearing in the absence of the Appellant, both parties filed their submissions and the trial court delivered its Judgment on 11th September, 2018 in favour of the Respondent. The Appellant thereafter filed an Application dated the 29th March, 2019 seeking to stay execution and set aside the impugned Judgment, which Application was dismissed by the court, for lacking merit, vide its Ruling delivered on 3rd December, 2019. Subsequently, the Appellant, filed another Notice of Motion Application dated the 18th December, 2019 seeking orders to stay as well as set aside the impugned Judgment or in the alternative, a review of the said the Judgment. The Lower Court vide its Ruling dated the 16th June, 2020 proceeded to dismiss the said Application on the ground that, it lacked merit and was res judicata and it is this impugned Ruling that forms the fulcrum of the Appeal herein.
9. For the avoidance of doubt, I will reproduce the prayers sought in the two Applications dated the 29th March, 2019 and 18th December, 2019 hereunder:
10. In the Application dated the 29th March, 2019, the Applicant (Appellant) had sought the following Orders:-
 1. That the Honourable Court be pleased to grant leave for the Defendant/Applicant's advocate, M/S F. M. Mulwa to come on record after the Judgment in the place of M. Mutinda & Mutisya Advocates.
 2. That there be a stay of execution of the Judgement delivered by Honourable Court on 11th September, 2018 and all the consequential orders thereto pending the hearing and determination of this Application.



3. That this Honourable Court be pleased to set aside the final Judgment entered herein and delivered by the Honourable Court on 11th September, 2018 and all the consequential orders thereto and the Defendant, be granted leave to file and serve its amended Statement of Defence out of time.
 4. That the costs of this Application be provided for.
11. While in the subsequent application dated the 18th December, 2019, the Applicant (Appellant) sought for the following Orders:-
1. That this Application be certified urgent, and be heard ex parte at the first instant.
 2. That there be stay of execution of this Court's Decree herein and all consequential orders pending hearing and determination of this Application.
 3. That the Defendant herein be granted leave to change advocates from M. Mutinda & Associates to Nzei & Company Advocates, and the Notice of Change of filed herewith and dated 18th December, 2019 be deemed as duly filed and served.
 4. That this Honourable Court's ex parte Judgement delivered on 11th September, 2018 be set aside, and the Defendant be allowed to defend the suit herein and to prosecute his Statement of Defence herein dated 6th May, 2016.
 5. That in the Alternative to prayer No. 4 hereinabove, this Honourable Court's ex parte Judgement dated 11th September, 2018 be reviewed and set aside.
 6. That costs of this Application.
13. From a perusal of the two Applications, I will analyze whether the second one, dated the 18th December, 2019 was res judicata or not.
14. On res judicata, Section 7 of the Civil Procedure Act, stipulates that:-
- 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.”
15. Still on res judicata, the Court in Stephen Wanganga Njoroge Vs Stanley Ngugi Njoroge & Another (2017) eKLR favourably referred to the case of Uhuru Highway Development Ltd V Central Bank & Others, CA No. 36 of 1996 where the Court of Appeal had stated that:-
- In order to rely on the defence of res judicata, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit.”
16. Further in the case of Nancy Mwangi t/a Worthlin Marketers V Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 Others (2014) eKLR, J Gikonyo stated thus:-
- The Courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before court. The test is whether the Plaintiff in the second suit is trying to bring before the court in another way



and in a form of new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi Vs National Bank of Kenya Limited and others* (2001) EA 177, the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. In that case the court quoted Kuloba J. in the case of Njangu Vs Wambugu and another Nairobi HCCC No. 2340 of 1991 (unreported) where he stated, if parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata...’

17. In relying on the legal provisions, I have cited above, as well as associating myself with the decisions quoted while applying them to the circumstances at hand, I note the two aforementioned Applications involved the same parties, were in one suit, parties were litigating under the same title and the issues were determined by a competent court. Further, the Appellant despite the Ruling delivered on 3rd December, 2019 for the previous Application, still proceeded to file another one dated the 18th December, 2019 raising the same issues, involving the same title as well as parties and the Court proceeded to dismiss it, on the ground that it was unmerited as well as res judicata. Further, from the Record of Appeal, I have had a chance to peruse the proceedings and Judgment in Machakos Chief Magistrate’s Court Civil Suit Number 1026 of 2004 (Joseph Muthini Wambua -Vs- Isingi Kikumbi Kamala) and I note it dealt with the suit land but Hon. Hellen Omondi Chief Magistrate, struck it out, on 13th February 2006 on the ground that the said court did not have jurisdiction to handle the matter, as it was the Land’s Dispute Tribunal that was meant to deal with it. In applying the explanation in Section 7 of the *Civil Procedure Act*, I am of the view that since the said suit was not heard and fully determined on merit, the lower court case being Machakos CMCC No. 214 of 2016, could hence not be deemed as res judicata.
18. In the circumstances, I find that the second Application dated the 18th December, 2019 filed by the Appellant seeking similar orders which had already been determined, was indeed res judicata. I opine that if the Appellant was aggrieved by the Judgment of the trial Magistrate, he should have lodged an Appeal against it.
19. From the proceedings in the lower court culminating in the impugned Judgment, it is evident that the Appellant including his Advocates failed to severally attend court for mentions and hearing. Further, the trial Magistrate proceeded with the hearing and in her Judgment dated and delivered on 11th September 2018, indeed considered the Appellant’s Defence. I opine that the said Judgment was not ex parte as claimed by the Appellant. The Appellant seems to shift the burden of proving his case upon his erstwhile advocates and blames him for failure to attend court, but I find this excuse lame as he was the party to the suit and not his advocate. I further find that the Learned Magistrate did not err in law and fact as claimed as the Appellant’s Application dated the 18th December, 2019 was indeed a replica of a prior Application dated 29th March, 2019 and filed by the Appellant on 17th July, 2019. It is my observation that Litigation must come to an end. In the foregoing, I find that the Learned Magistrate hence did not err in law and fact in her impugned Ruling by holding that the second Application lacked merit and was res judicata.
20. In the circumstances, I find the Appeal unmerited and will proceed to dismiss it with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 2ND DAY OF MAY, 2024

CHRISTINE OCHIENG



JUDGE

In the presence of;

Ms. Macharia for Respondent

Mundia for Nzei for Appellant

Court Assistant – Simon

