



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KISII

ELC APPEAL NO. 7 OF 2020

BENJAMIN AMENGA ONCHURU.....APPELLANT

VERSUS

DANIEL NYAGAYA OEBA.....RESPONDENT

(Appeal from the Judgment and Decree of **Hon. S.N. Makila** (Senior Resident Magistrate) Dated and Delivered on the 21st day of February 2020, in **Kisii CMCC Elc No. 167 Of 2018**)

JUDGMENT

INTRODUCTION

1. The Appellant herein filed suit in the Chief Magistrate's Court claiming that the Respondent had trespassed into his parcel of land known as NYARIBARI MASABA BOKIMOTWE 1/1539. He alleged that he bought the said parcel of land from the Respondent vide a sale agreement dated 19th August, 1982 and subsequently became the registered owner of the said parcel on 2nd March, 1987 when a title deed was issued to him.
2. It was his contention that the Respondent had without his participation proceeded to the Land Registrar's office and caused his title to be cancelled after which the land reverted to the original title number NYARIBARI MASABA BOKIMOTWE 1/566. The said parcel was later illegally subdivided into parcels number NYARIBARI MASABA BOKIMOTWE 1/3072 and NYARIBARI MASABA BOKIMOTWE 1/3070.
3. He further contended that the Respondents action of causing his title to be cancelled and later subdivided into parcels number 3072 and 3073 was illegal and was meant to disinherit him. He thus prayed for orders that the cancellation of his title be revoked, the titles to parcels 3072 and 3073 registered in the name of the Respondents be cancelled and the Respondents be ordered to move out of his land.
4. The Respondent denied the Appellant's claim and stated that the Appellant had on 24th June, 1986 fraudulently and without his consent caused his property known as NYARIBARI MASABA BOKIMOTWE 1/566 to be subdivided into parcels number NYARIBARI MASABA BOKIMOTWE 1/1538 and NYARIBARI MASABA BOKIMOTWE 1/1539 after which the Appellant illegally became the registered owner of NYARIBARI MASABA BOKIMOTWE 1/1539.
5. He stated that he tried to have the issue resolved amicably but the Appellant refused to cooperate forcing him to file a case at the Keumbu Land Disputes Tribunal in 2009, seeking revocation of the fraudulent subdivisions. He deposed that despite being served with summons to attend the Tribunal on the 13th August 2009, the Appellant failed to attend and the hearing proceeded in his absence.
6. The Tribunal delivered its ruling on 24th November, 2010 allowing the Respondent's claim. The award of the Tribunal was subsequently adopted as a judgment of the court by the Magistrate's Court at Kisii vide **Msc. Application No. 34 of 2010** and a decree was issued on 12th May, 2010.
7. After adopting the said award of the Land Disputes Tribunal, the Magistrate's Court gave the Appellant 30 days to appeal but the Appellant failed to do so despite being served with the decree of the court.
8. The Respondent averred that on 3rd May, 2010 his title (NYARIBARI MASABA BOKIMOTWE 1/566) was reinstated and the Appellant never raised any objection. He further averred that it was after the reinstatement of his title that he went ahead to subdivide his property into parcels number 3072 and 3073 since there was no restriction. He therefore prayed that the Appellant's suit be dismissed.

9. The case proceeded for hearing and both parties testified and called their witnesses. Thereafter the trial Magistrate directed the parties to file their written submissions which they did. After reviewing the competing evidence of the parties, the trial Magistrate held that the adoption of the decision of the Tribunal by a Magistrate's Court of concurrent jurisdiction meant that the trial court was *functus officio* and she could not therefore give any other judgment on the subject matter. The Trial Magistrate therefore declared the matter as *res judicata* and dismissed the Appellant's claim with costs to the Respondents.

10. The Appellant herein, being aggrieved by the Judgment and Decree of the Trial Magistrate, filed this appeal citing the following Grounds of Appeal;

That the Learned Trial Magistrate erred in law and fact by:

- a. Failing to determine the real issues before her;
- b. Failing to hold that the Appellant is a bonafide purchaser;
- c. Failing to evaluate the evidence, pleadings before her and more particularly the evidence that the Appellant bought land from the Respondent as conceded by the Respondent;
- d. Applying wrong principles of the law and thus arrived at a wrong conclusion.
- e. Giving more credence to the evidence of the Respondent and giving no reasons as to why the evidence of the Appellant/Plaintiff was not credible.
- f. Misapprehending the evidence of the Appellant/Plaintiff.

11. After failed attempts to have the matter settled out of court, the court directed that the appeal be canvassed by way of written submissions and both parties filed their submissions.

APPELLANT'S SUBMISSIONS

12. Learned counsel for the Appellant submitting on grounds 1, 2, 3 of the Grounds of Appeal, argued that the Learned Trial Magistrate erred by finding that the land sale agreement between the parties with respect to the suit property was unenforceable despite the fact the Respondent was an active participant in it and had full knowledge of the same since he received monies from the Appellant. Learned counsel further argued that the trial court failed to consider the rights of the Appellant who had lost money to the Respondent in its finding that the agreement was unenforceable.

13. Regarding grounds 4, 5 and 6, counsel argued that the Learned Trial Magistrate erred by holding that the matter was *Res Judicata* for reasons that the Appellant had failed to attend the hearing at the Land Disputes Tribunal and a judgment had been delivered. He argued that such a finding was one based on a procedural technicality which is discouraged under Article 159 (d) of the Constitution. He also argued that the said finding served to deny the Appellant his right to a fair hearing as provided under Article 50 (1) of the Constitution.

RESPONDENT'S SUBMISSIONS

14. The Respondent submitted that the Trial Magistrate had analyzed all the evidence presented before her and determined the case on merit. The Respondent further argued that the Appellant did not challenge the court order and Decree dated 12th May, 2010 issued by Hon. Njeri Thuku wherein the court had nullified the land sale agreement, revoked the Appellant's title in respect of Land parcel number NYARIBARI BOKIMOTWE 1/1539 and ordered that the same to revert to the original title NYARIBARI BOKIMOTWE 1/566.

15. The Respondent argued therefore that the title for NYARIBARI BOKIMOTWE 1/1539 having been cancelled, was not transferable and hence this court should not reinstate it at the appeal stage.

16. The Respondent submitted that prior to the suit being filed at the trial court, land parcel NYARIBARI BOKIMOTWE 1/1539 which was the subject matter therein had also been the subject matter in the dispute at the Keumbu Land Disputes Tribunal which had ruled that the same be cancelled. He stated that the award of the Tribunal was adopted in 2010 by Hon. Njeri Thuku as an order of the court and a decree issued to that effect. The Respondent contended that the Respondent did not bother to file an application to set aside the order of the court which cancelled the title together the land sale agreement and went on to reinstate the original title. He urged the court to dismiss the appeal with costs.

ISSUES FOR DETERMINATION

17. Having considered the Record of Appeal and rival submissions, I find that the main issue for determination is whether the trial court erred in holding that the Appellant's case was *Res Judicata*.

ANALYSIS AND DETERMINATION

18. This being a first appeal, this court has to re-evaluate the evidence and make its own findings. The findings of the lower court must nevertheless be given due deference unless they fall foul of proper evaluation in line with the evidence on record or the trial court is found to

have acted on wrong principles in reaching its findings. See the case of **Ephantus Mwangi V Duncan Mwangi Wambugu (1982) IKAR**. The Appellant's case was dismissed by the trial court on grounds that the matter was *res judicata* given that the Kisii Chief Magistrate Court through Misc. App No. 34 of 2010 adopted the award of Keumbu Land Dispute Tribunal as a judgment of the court.

19. The Learned Trial Magistrate further held that the said adoption of the order having been done by a court of concurrent jurisdiction, the trial court was *fanctus officio*.

20. Additionally, the Trial Magistrate held that the subject matter of the suit before her was land parcel number NYARIBARI BOKIMOTWE 1/1539, whose title had already been adjudged as revoked by the adopted judgment of the court and hence the same could not again be subject of the suit before her nor could it be transferable.

21. The doctrine of *res judicata* is embodied in Section 7 of the Civil Procedure Act which provides as follows:

S. 7 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.

22. Further, the Court in the case of **Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR** held that:

“The elements of *res judicata* have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed *res judicata* on account of a former suit;

- (a) The suit or issue was directly and substantially in issue in the former suit.
- (b) That former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in the former suit.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

23. From the Record of Appeal, it is not in dispute that the Appellant did not challenge the Court Order and Decree dated 12th May, 2010 issued by Hon. Njeri Thuku in Kisii Magistrate Court Misc. App No. 34 of 2010. It is also not in dispute that the said order adopted the award of Land Disputes Tribunal that had nullified the land sale agreement alleged to have existed between the parties and revoked the Appellant's title in respect of NYARIBARI BOKIMOTWE 1/1539. It is also not disputed that the Appellant did not appeal against the said court order even after being given 30 days to do so.

24. In the circumstances, the trial court had no option other than to enter judgment in the manner it did. It is trite law that the doctrine of *res judicata* is a fundamental legal issue that affects the jurisdiction of a court determining a matter and which the court must first and foremost determine before dealing with other issues. A court cannot proceed to determine a matter where it lacks jurisdiction. The determination of the Trial Magistrate that it lacked jurisdiction to deal with a matter involving the same parties and the same subject matter which had substantially been determined by a court of concurrent jurisdiction cannot be regarded as a procedural technicality as argued by counsel for the Appellant.

25. The upshot is that the Appeal is without merit and it is hereby dismissed in its entirety with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 8TH DAY OF FEBRUARY, 2022

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J.M ONYANGO

JUDGE