



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL CASE NO. 24 OF 2018

**PENINNA NTAKIRA (Suing as the legal
representative of Lucy Matira Itu)..... APPELLANT**

VERSUS

MUGAMBI ITU..... 1st RESPONDENT

SIMON KIAMBI.....2nd RESPONDENT

STEPHEN JOHN MURURU KILINGO.....3RD RESPONDENT

JUDGMENT

(Being an appeal from the Judgement and Decree of Hon. S. Abuya Senior Principal Magistrate at Meru in

CMCC No. 1108 of 1998 delivered on 26th June 2018)

Summary of facts

By a plaint dated 14th December 1998, the deceased Plaintiff Lucy Matira Itu, sued the Respondents (then Defendants) for breach of trust and collusion to deprive her of her entitlement to a parcel of land, being LR.NO Kiiirua/Ruiri/1915, left behind by her deceased husband (herein after referred to as the suit land). The suit land at the time of filing the plaint was registered in the name of the 3rd Respondent herein. It was the deceased's case that the suit land was family land and that therefore the 3rd Respondent held the same in trust for her and her family. The deceased thus approached the court seeking the following orders:

- a. An order that the 3rd defendant transfer the suit land LR. No Kiiirua/Ruiri/1915 to the Plaintiff and in default that the Executive Officer of the court sign all necessary documents leading to the transfer of the said land to the Plaintiff;***
- b. Costs and interest at court rates.***

The 2nd and 3rd Defendants therein filed their defence on 11th January 1999. The Defendants denied the matters pleaded in the plaint and on 25th January 2002 filed an amended defence and counterclaim. The counterclaim raised the following issues:

- a. That the 3rd Defendant states that he is the registered proprietor of Land Parcel No. Kiiirua/Ruiri/1915 and entry upon it by the Plaintiff or her agents, servants, employees or anybody claiming under them is illegal;***
- b. That the 3rd Defendant acquired the Suit Land vide a valid judgement in CMCC No.159 of 1984 which judgement had never been challenged by the Plaintiff;***
- c. That ownership of Kiiirua/Ruiri/1915 was already determined in CMCC No. 159 of 1984 was hence res judicata. That the court ought to strike out the suit on this ground;***
- d. That the 2nd Defendant has wrongfully been enjoined in the suit and all allegations in the plaint are denied save to admit that the 3rd Defendant is the registered owner of Kiiirua/Ruiri/1915;***

e. That the claim of trust, fraud, secret dealings in respect of the Suit Land is unfounded and indeed the Plaintiff and 1st Defendant have colluded to institute the suit.

The 2nd and 3rd Defendants thus sought orders for an order of permanent injunction restraining the Plaintiff from cultivating, planting, destroying or putting up any structures or interfering in any way with the Suit Land; mesne profits from 1984 to the date of judgement; a declaration that the 3rd Defendant is the legal owner of the Suit Land; general damages and costs and interest.

The matter was heard and determined in the Chief Magistrate's court at Meru in civil case no. 1108 of 1998. Unfortunately, the Plaintiff passed away on 22nd July 1999 and was substituted by Peninna Ntakira as her legal representative. In the judgement issued on 26th June 2018, the trial court found that the suit was res judicata on the basis of the proceedings and judgement issued in CMCC No. 159 of 1984 and struck out the same.

Issues for determination

Aggrieved by the judgement of the trial court, the Appellant herein mounted the present appeal, lodging her memorandum of appeal on 26th June 2018. The Appellant set out seven grounds of appeal as follows:

1. *That the learned trial Magistrate erred in law and fact by finding that the Plaintiff's suit was identical with CMCC No. 159 of 1984 and that the fact that the 3rd Defendant had emerged in the present suit did not change the position;*
2. *The learned trial Magistrate erred in law and fact by finding that the subject matter in CMCC No.159 of 1984 was 1 acre of land from L.R. No. Kiirua/Ruiri/1378 and was the same as Kiirua/Ruiri/1592, 1916 and 1915 when there was no evidence to support such a finding;*
3. *The learned trial Magistrate erred in law and fact by finding that the present suit is res judicata with CMCC No.159 of 1984 whereas the suit and subject matter parcels of land did not prove the same as required by law;*
4. *The learned trial Magistrate erred in law and fact by failing to analyze the entire evidence on record and find that the Defendants had filed a counterclaim and that they did not prove the same as required by the law;*
5. *The learned trial Magistrate erred in law and fact in that she failed to find that the Defendant's counterclaim was statute and time barred and that the same was not supported by a verifying affidavit as required by law;*
6. *The learned trial Magistrate erred in law and fact in that she failed to consider the judicial authorities which were tendered in court and thereby arrived at the wrong finding;*
7. *The decision of the learned trial Magistrate is against the weight of evidence and the same is bad in law.*

Submissions of counsels for the Appellant and Respondent

The Appellant filed her submissions on 9th September 2020, while the Respondents filed theirs on 5th October 2020. The Appellant seemed to have narrowed down the grounds of appeal in the memorandum to three key grounds.

First that the learned trial Magistrate erred in fact and in law in finding that the suit was res judicata with CMCC No. 159 of 1984 whereas the suits and the subject parcels of land were distinct and different. Secondly that the learned trial Magistrate had erred in law and fact by finding that the subject matter in CMCC. No 159 of 1984 was 1 acre of land from L.R No Kiirua/Ruiri/1378 was the same as Kiirua/Ruiri/1592,1916 and 1915 when there was no evidence to support such a finding. Lastly, that the learned trial Magistrate erred in law and fact by finding that the Plaintiff's suit was identical with CMCC. No. 159 of 1984 and that the same was substantially the same and that the fact that the 3rd Defendant had emerged in the suit did not change the position.

It is the Appellant's case that the judge made a wrong finding in concluding that the suit was res judicata. In support of her position, she cited the following authorities: *The Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 Others (2017) e KLR and Section 7 of the Civil Procedure Act*. The Appellant thus prays that the decision of the trial court be set aside and the appeal be allowed.

The Respondents reiterate that the 3rd Respondent is the registered proprietor of the Suit Land, that at no time did the sale and transfer of the Suit Land constitute a breach of trust or entail fraud as alleged by the Appellant. On the question of res judicata, the Respondents agree that the trial court was correct in finding the suit to be identical to the CMCC. No. 159 of 1984 and rely on the following authorities in support of their position: *The Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 Others (2017) e KLR; Christopher Orina Kenyariri t/a Associates Advocates Vs Salama Beach Hotel Limited & 3 Others (2017) e KLR; E.T Vs Attorney General & Another (2012) e KLR; Henderson Vs Henderson (1) 67 E.R. 313; Omondi Vs National Bank of Kenya Limited & Others (2001)EA 177.*

Legal analysis and opinion

Before getting into the substance of the appeal, it is instructive to call to remembrance the duty to be borne by a court invited to consider a first appeal.

In *Selle Vs Associated Motor Boat Co. [1968] EA 123*, the legal parameters and considerations for guiding a court of first appeal were set out

as follows:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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. In particular, the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

Further guidance is given by the Court of Appeal decision in ***Ephantus Mwangi and Another Vs Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278*** :

“A member of an appellate court is not bound to accept the learned Judge’s findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.

From the foregoing, the mandate of this court in the present instance is to evaluate the factual details of the case as presented in the trial court, to analyze them and to arrive upon its independent conclusion, but always bearing in mind that the trial court had the advantage of seeing and hearing the parties.

Now, to the substance of the appeal. The court has anxiously considered the rival pleadings and submissions of the parties in its analysis and determination of the matter.

From the onset, there is no dispute that the 3rd Respondent is the registered proprietor of the Suit Land. Indeed, a copy of the title deed issued to the 3rd Respondent by the Land registrar sitting at Meru on 8th December 1993 was filed and marked D Exh 1. It is also not in contention that the Suit Land was transferred to the 3rd Respondent by the 2nd Respondent.

Although the Appellant listed seven grounds of appeal in her memorandum and narrowed the same to three grounds in her submissions, it is clear to the Courts mind that the central question is whether or not the trial magistrate erred in striking out the suit on grounds of *res judicata*. The Appellant’s submissions express displeasure with the courts finding that the suit as filed is identical or substantially similar to CMCC. No 159 of 1984. The Respondents on the other hand are in fact the ones who raised the objection and support the finding of the resemblance between the two cases, and the inevitable operation of the doctrine of *res judicata*.

The doctrine of *res judicata* is captured under **Section 7 of the Civil Procedure Act (Cap 21 Laws of Kenya)**. The section is set out verbatim hereunder:

Section 7 of the Civil Procedure Act (Cap 21 Laws of Kenya).

“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.

Explanation (1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.’

The Court in ***Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates Vs Salama Beach Hotel Limited & 3 others [2017] eKLR*** rationalized the doctrine of *res judicata* in the following words:

“The rule or doctrine of res judicata served the salutary aim of bringing finality to litigation and afforded parties closure and

respite from the specter of being vexed, haunted and hounded by issues and suits that had already been determined by a competent court. It was designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata rested in the public interests for swift, sure and certain justice.”

Once a finding of *res judicata* has been identified, it operates as a complete estoppel against any suit that runs afoul of it, and there is no way of going around it, not even by consent of the parties because it is the Court itself that is debarred by a jurisdictional injunction from entertaining such suit. See **Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates Vs Salama Beach Hotel Limited & 3 others [2017] eKLR**.

Once barred from entertaining a matter, the court is required to down its tool and not to take another step. The *locus classicus* on jurisdiction is the celebrated case of **Owners of the Motor Vessel “Lillian S” Vs Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

The foregoing principles will be the litmus as to whether or not the trial court’s findings were proper.

Prior to the filing of Suit CMCC No.159 of 1984, the deceased Plaintiff and the 1st Defendant had agreed to sell 3 acres of land to the 2nd Defendant at a consideration of Five Thousand Shillings (Ksh. 5,000) per acre. The 2nd Defendant made a part payment of Five Thousand Shillings (Ksh. 5,000) and in the process of the transaction realized that the Vendors (the deceased Plaintiff and the 1st Defendant) did not appear willing to actually transfer the land to him. The 2nd defendant thus filed suit CMCC No.159 of 1984 in a bid to compel the Vendors to transfer the land to him. Since the vendors had already used up the part consideration paid by the 2nd Defendant, the parties to the case agreed that the Vendors would transfer 1 acre of land out of Kiirua/Ruiri/1378 to the 2nd Defendant and that the 2nd Defendant would give an additional purchase price of Three Thousand Five Hundred Shillings (Ksh. 3,500) to the Vendors. It was further agreed that the attendant costs of transferring the land, being One Thousand Seven Hundred Shillings (Ksh.1,700) would be borne equally by the Vendors and the Purchaser. The consent was filed in court as judgement in the matter. In the course of executing the judgement, it was discovered that the Vendors (the deceased Plaintiff and the 1st Defendant) had subdivided their land and retained a portion of land assigned a new parcel number, being Kiirua/Ruiri/1592 in a title deed issued jointly to the deceased Plaintiff, 1st Defendant and one Francis Nkanda Itu on 13th March 1988. The award of one acre given to the 2nd Defendant was thus excised from land parcel Kiirua/Ruiri/1592 and registered in the 2nd defendant’s name as land Parcel No. Kiirua/Ruiri/1915. From the foregoing, the question considered by the court in CMCC No.159 of 1984 was the validity of the sale agreement between the deceased Plaintiff and 1st Defendant on the one hand and the 2nd Defendant on the other hand. The orders given were for the excision of one acre from land parcel Kiirua/Ruiri/1592 in favour of the 2nd Defendant.

The suit filed by the deceased Plaintiff on the other hand surrounded the ownership of land Parcel No. Kiirua/Ruiri/1915 ostensibly as family property held in trust by the 3rd Defendant for deceased Plaintiff and her family. While the court is in agreement with the holding in **Omondi Vs National Bank of Kenya Limited & others [2001] EA 177** where it was stated thus:

“...Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.”

The court respectfully disagrees with the trial court that the issues in CMCC. No.159 of 1984 are substantially the same as in the suit filed by the deceased Plaintiff. As noted CMCC. No.159 of 1984 dealt with a sale agreement and the resultant rights of the 2nd Defendant to one acre from land parcel Kiirua/Ruiri/1592. The present suit on the other hand interrogates the process by which that title moved to the 3rd Defendant, who is the current registered proprietor of what became registered as land Parcel No. Kiirua/Ruiri/1915. The court therefore agrees with the Appellant that the finding of *res judicata* by the trial court was misplaced.

That notwithstanding, the onus of proving fraud and breach of trust lay with the Appellant.

In **Central Bank of Kenya Ltd -Vs- Trust Bank Ltd & 4 Others Civil Appeal No. 215 of 1996** Court of Appeal in considering the standard of proof required where fraud is alleged stated as follows:

“..... Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the person alleging than in an ordinary Civil Case.”

Again in **Christopher Ndaru Kagina Vs Esther Mbandi Kagina & another [2016] e KLR**, the court cited with approval the case of **Paragon Finance plc Vs D B Thakerar & Co**, where the court stated:

“It is well established that fraud must be distinctly alleged and also distinctly proved...If the facts pleaded are consistent with innocence it is not open to the court to find fraud. The burden is always on the claimant to prove fraud on the part of the Respondent. The standard of proof where fraud is alleged is high. Though it is the same civil standard of proof on a balance of probabilities, it is certainly higher than the ordinary proof on a balance of probabilities but lower than proof beyond reasonable doubt. It all depends on the nature of the issue and its gravity. Evidence of especially high strength and quality is required to meet

the civil standard of proof in fraud cases. It is more burdensome.”

The Appellant, save for mere allegation did not tender any evidence to lead the court to find fraud in the conduct of the Defendants in their dealing with the Suit Land. In any case, the account of the 2nd Defendant, buttressed by the court proceedings and judgement delivered in CMCC. No.159 of 1984, reveals a *bonafide* agreement to purchase land from the deceased Plaintiff and the 1st Defendant. The acquisition of land by the 2nd Defendant was done with the knowledge and consent of the deceased Plaintiff as a party to the transaction.

Similarly, the question of land held in trust for the family requires cogent evidence in support. The Supreme Court in the case of ***Isack M'inanga Kiebia Vs Isaaya Theuri M'lintari & another [2018] e KLR*** considered the elements required to qualify a claimant under customary trust as follows:

- “1. The land in question was before registration, family, clan or group land*
- 2. The claimant belongs to such family, clan, or group*
- 3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.*
- 4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.*
- 5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”*

Again, save for merely alleging that the land held by the 3rd Defendant is held in trust, the Appellant does nothing more to support her case. On the whole then, there is nothing in the Appellant's submissions that would warrant the piercing of the indefeasibility of title afforded to the 3rd Defendant by ***Section 26 of the Land Registration Act (No. 3 of 2012)***. See ***Elijah Makeri Nyangw'ra Vs Stephen Mungai Njuguna & Another (2013) e KLR*** where the court held as follows:

“..... Title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. Hon Justice Munyao Sila in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

In the end, it is my finding that the judgement rendered by the trial court on 26th June 2018 should be set aside which I hereby do. I also make a declaration that the 3rd Respondent duly registered as proprietor of the Suit Land Parcel No. KIIRUA/RUIRI/1915 is the lawful and bona fide owner of the said parcel of land.

The costs of this Appeal is awarded to the Respondents.

DATED, DELIVERED VIRTUALLY AND SIGNED AT GARISSA THIS 28TH DAY OF JULY, 2021.

.....

E.C. CHERONO

ELC JUDGE

In the presence of:

1. Appellant/Advocate- Absent
2. Respondents/Advocate- Absent
3. Fardowsa ; Court Assistant- Present