



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCA CASE NO. 19 OF 2020

AGNETTA MMBONE OKWEMBA..... APPELLANT

VERSUS

ZAKARIA MUGATSIA ANYULA.....RESPONDENT

JUDGEMENT

The appellant being aggrieved by the ruling of the Magistrate of the Notice of Motion dated 16th July 2020 in Vihiga PMCC Case No. 36 of 2020 puts forth the following grounds of appeal:-

1. That the honourable magistrate erred in fact and in law in failing to find that the doctrine of res judicata did not apply.
2. That the honourable magistrate erred in fact and in law in finding that the appellant did not rebut the issues of res judicata thus the respondent has proved his case on a balance of probability and the suit be dismissed with costs.
3. That the honourable magistrate erred in law in failing to evaluate the evidence before him that the matters raised in Kakamega HC Case No. 223 of 2017 were not directly and substantially the same as the matters before him.
4. That the honourable magistrate erred in law in failing to find that the subject matter of Kakamega ELC Case No. 223 of 2017 was removal of caution under section 73 (1) of the Land Registration Act and no other suit had been filed on particulars of fraud under section 24 (1) of the Land Registration Act.
5. That the learned trial judge's final decision has occasioned a gross miscarriage of justice.

Reasons wherefore it is proposed that the said ruling be set aside and this honourable court do evaluate the ruling before it and arrive at a just decision.

The Appellant submitted that the parties are similar between Vihiga ELC Case No. 36 of 2020 and the Kakamega ELC case no. 223 of 2017. That the properties in Kakamega ELC Case No. 223 of 2017 are as well as the appeal appearing to be similar, as the subject for determination that is substantial in issue is Kakamega/Buyonga/795 but not the claim. In which case, the honourable magistrate erred in fact and in law in finding that the appellant did not rebut the issues of res judicata thus the respondent has proved his case on a balance of probability and the suit be dismissed with costs. And as a result the honourable magistrate erred in fact in failing to evaluate the evidence before him that the matters raised in Kakamega ELC Case No. 223 of 2017 were not directly and substantially the same as the matters before him. That according to the plaint leading to this appeal, while the respondent is registered as the proprietor of the land, the land belonged to his father one Herman Anyura Chasia who is deceased until the 9th day of October, 2002 when the defendant procured registration through fraud and the appellant adduced the said particulars of fraud. Also that, in Kakamega ELC Case No. 223 of 2017, the subject matter was removal of caution under section 73 (1) of The Land Registration Act and no other suit had been filed on particulars of fraud under section 24 (1) of the Land Registration Act. Yet, in making his decision the honourable magistrate disregarded these irrefutable facts and made a finding of res judicata and thereby occasioning gross miscarriage of justice. Since, be that as it may that the parties and the subject matter are the same, the claim is far from being similar. Therefore, in introducing a new suit under Vihiga ELC Case No. 36 of 2020 the suit is not res judicata and the decision by the trial magistrate to entirely dismiss the entire suit with costs to the defendant was erred. That Res judicata is meant to lock out a party who has had their day in a court of competent jurisdiction from re-litigating the same issues against the same opponent. This appeal is however merited and will not be a waste of the court's time. The question in whether the appellant satisfied the conditions for the principle to apply in her case leading to this appeal. The rule or custom has been that the appellate court will not normally interfere with a finding of fact by the trial court unless it is based on evidence or a misapprehension of the evidence or the judge/magistrate is shown demonstrably to have acted on wrong principles in reaching the findings they did. In this case the court should find that the principle of res judicata did not apply and the trial magistrate erred in law and fact in evaluating the evidence presented before them and misapprehending the claim.

The respondent submitted that the appeal emanates from Vihiga Senior Principal Magistrate's Court Environment and Land Case No. 36 of

2020, Agnetta Mmbone Okwemba vs. Zakaria Mugatsia Anyula. That the appellant herein was the plaintiff in the lower court whilst the respondent herein was the defendant. As per the plaint dated 16th June, 2020 in the lower court the plaintiff had prayed for orders that land parcel Kakamega/Buyonga/795 be subdivided into two equal portions on account of the defendant holding half a share in trust for the plaintiff. The respondent herein filed a defense dated 23rd June, 2020 and pleaded inter alia raising a preliminary objection that the Vihiga Lower Court suit was Res-Judicata by virtue of another suit Kakamega High Court, Environment and Land Case No. 223 of 2017, Zakaria Mugatsia Anyura vs. Agnetta Mmbone Okwemba, the respondent herein Zakaria Mugatsia Anyura had sued the appellant for removal of a caution she had placed on the suit land Kakamega/Bunyonga/795 and the court had ruled in favour of the respondent herein Zakaria Mugatsia Anyura. The appellant herein (Agneta Mmbone Okwemba) in the above said Kakamega High Court, Environment and Land Case No. 223 of 2017, Zakaria Mugatsia Anyura vs. Agnetta Mmbone Okwemba had raised a defence and a counter claim that she was entitled to half of the said land based on the same reasons which she used as the basis for filing the Vihiga lower court suit.

At the hearing of the main suit in the lower court at Vihiga the court had first to address the preliminary objection as to whether the Vihiga suit was indeed “Res-Judicata” by virtue of the judgment in the above referenced Kakamega High court, Environment and Land Case No. 223 of 2017, Zakaria Mugatsia Anyura vs. Agnetta Mbone Okwemba. That all parties were given a chance to ventilate on the said preliminary objection as to whether the Vihiga suit the subject of this appeal was indeed Res-Judicata or not by virtue of Kakamega High Court, Environment and Land Case No. 223 of 2017, Zakaria Mugatsia Anyura vs. Agnetta Mmbone Okwemba.

The respondent submitted that, the lower court after hearing both parties did up hold the preliminary objection by the respondent herein that indeed the Vihiga suit was Res-judicata by virtue of Kakamega High Court, Environment and Land Case No. 223 of 2017, Zakaria Mugatsia Anyura vs. Agnetta Mmbone Okwemba hence the appeal herein. The same prayers sought in the counter claim in Kakamega High Court, Environment and Land Case No. 223 of 2017, Zakaria Mugatsia Anyura vs. Agnetta Mmbone Okwemba are the same prayers sought and or advanced in the plaint in Vihiga Lower Court suit. That the appellant herein if she felt she had been aggrieved by the judgment of this honourable court in Kakamega High Court, Environment and Land Case No. 223 of 2017, Zakaria Mugatsia Anyura vs. Agnetta Mmbone Okwemba she should have preferred an appeal to the Court of Appeal at Kisumu. However, after losing in this honourable court in Kakamega High Court, Environment and Land Case No. 223 of 2017, Zakaria Mugatsia Anyura vs. Agnetta Mmbone Okwemba, the appellant herein failed to prefer an appeal against the judgment of this honourable court to the Court of Appeal at Kisumu, she instead went to the lower court at Vihiga and filed the suit the subject of the appeal herein.

This court has considered the appeal and the submissions herein. The appeal emanates from Vihiga Senior Principal Magistrate’s Court Environment and Land Case No. 36 of 2020. Agnetta Mmbone Okwemba vs. Zakaria Mugatsia Anyula. The appellant herein was the plaintiff in the lower court whilst the respondent herein was the defendant. The appeal is because of the ruling from the trial Magistrate where the suit was struck off on a preliminary objection for being res judicata.

A Preliminary Objection, as stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

“..... consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”

In the same case, Sir Charles Newbold said:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion”.

The issue as to whether or not this suit is res judicata or sub judice was therefore properly raised as a Preliminary Objection in the Trial Court. Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

Section 6.

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

Section 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.”

This court has taken the liberty to peruse Kakamega High Court, Environment and Land Case No. 223 of 2017, Zakaria Mugatsia Anyura vs. Agnetta Mbone Okwemba and indeed find that the parties are the same and subject matter is the same. This is also not disputed except that it is the appellant’s submissions that the claim is not the same. On this point the court would like to refer to the case of Pop In Kenya Ltd & 3 Others vs Habib Bank A.G. Zurich C.A. NO. 80 of 1988 where it was held quoting with approval the case of Yat Tung Investment Co. Ltd vs. Dao Heng Bank Ltd (1975) AC 581.

“Where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court

requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same litigation in respect of matters which might have been brought forward as part of the subject in contest, but which were not brought forward only because of they have, from negligence, inadvertence or even accident omitted part of their case. The plea of res-judicata applies, except in special cases, not only to point upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward.

In the case of Henderson vs. Henderson (1843) 3 Hare 100 to 115 the same holding was reached that;

“Res Judicata also applies to every point which might properly belonged to the subject of litigation and which the parties exercising due diligence might have brought forward at the time.”

This court finds that the parties being the same and the subject matter the parties to that litigation ought to have brought forward their whole case, and cannot allow the same parties to open the same litigation in respect of matters which might have been brought forward as part of the subject in contest, but which were not brought forward, from negligence, inadvertence or even accidentally omitted as part of their case. I find that the Trial Magistrate did not err when he found that this matter was res judicata Kakamega High Court, Environment and Land Case No. 223 of 2017, Zakaria Mugatsia Anyura vs. Agnetta Mbone Okwemba. For those reasons I find that this appeal is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 21ST JULY 2021.

N.A. MATHEKA

JUDGE