



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC APPEAL NO. 10 OF 2019

SOLOMON ONYANGO OUKO.....APPELLANT

-VERSUS-

JOYCE PENINA ADHIAMBO.....RESPONDENT

(Being an appeal against the ruling of the trial Court at Winam Principal Magistrate's

Court in ELC No. 50 of 2018 delivered on 25th March 2019

by HON. BERNARD KASAVULI (PM)

IN

SOLOMON ONYANGO OUKO.....PLAINTIFF

-VERSUS-

JOYCE PENINA ADHIAMBO.....DEFENDANT

JUDGMENT

BRIEF FACTS

The Plaintiff/Appellant, SOLOMON OUKO filed a suit in the Environment and Land Court in Kisumu (ELC NO. 27 OF 2016) against the Defendant, JOYCE PENINA ODHIAMBO on 18/02/2016. The file was however transferred to Winam Law Courts on 18/04/2018 and given a new case number, being Winam Environment and Land Case No. 50 of 2018. The plaintiff claimed that he entered into a sale agreement with the defendant for the purchase of a plot being NO. 002 MANYATTA A 3298 for a consideration of Kshs. 235,000/-. That without the plaintiff's knowledge, the defendant entered into a sale agreement with a third party for the sale of the same plot after the plaintiff had made part payment of Kshs. 196,000/-, and that the property is now being occupied with a third party who is running a scrap metal business thereon. It is the Plaintiff's case that the plaintiff is therefore in breach of the sale agreement and prays for judgement against the defendant for:

- a) An order to compel the defendant to complete the transfer of the land to the plaintiff
- b) An order of permanent injunction restraining the defendant his/her relatives, agents, employee or tenant from trespassing into the said parcel of land.
- c) An Order for eviction against the current occupant who runs his scrap metal business thereon.
- d) Costs and interests

On 5/10/2018, the defendant's counsel failed a notice of preliminary objection seeking the dismissal of the suit on the following points of objection;

- a) That the Suit is res judicata

b) That the subject matter of this suit is non-existent.

Parties filed their respective submissions to the preliminary objection and the Court delivered its ruling on 25/03/2019 allowing the said preliminary objection and dismissing the suit with costs to the defendant.

GROUND OF APPEAL

Aggrieved by the ruling of the Court delivered on the 25/03/2019, the Plaintiff/Appellant filed this appeal against the ruling based on the following grounds;

1. The Learned Trial Magistrate erred in law and fact in holding that the subject matter of the suit is non-existence /it has extinguished.
2. The Learned Magistrate failed to appreciate the laws relating to preliminary objection.
3. The Learned Magistrate erred in fact by failing to appreciate the import of judicial decisions and statutory provisions that were cited before him in opposition to the preliminary objections when he arrived at the erroneous decision the fact that the subject matter was non-existence was a point of preliminary objections.
4. The Learned trial magistrate was sketchy and did not deal with the issues conclusively and in a manner required of a magistrate.
5. The Learned trial magistrate erred in law and in fact in failing to consider submissions and arguments of counsel for the plaintiff/respondent and in failing to consider and apply case law cited which are precedents binding upon the Court hence arrived at a wrong decision.
6. That the decision was against the weight of evidence.
7. That the Learned trial magistrate was completely biased against the appellant.

The appellant prays that the appeal be allowed with costs.

APPELLANT'S SUBMISSIONS

The appellant filed submissions on 3rd June 2020. The highlights of the submissions are as follows:

- a) That the test in determining whether a matter is res judicata include; that the matter in issue is identical in both suits, the parties in the suit are the same, sameness of title/claim, concurrence of jurisdiction and finality of the previous decision. The appellant relied on the case of **Bernard Mugo Ndegwa v James Nderitu Githae & 2 Others quoted in Paul Kamande Gichena v Jacob Kinyua Kiragu (2018) ECLR**
- b) That the instant suit is not res judicata as the matters in issue are not similar to those in the Succession Cause No. 547 of 2005. That only an order was annexed and not the proceedings and the Court is therefore left to speculate whether the applicant in the succession cause (Anthony Ian Omondi) filed an objection as a child of the deceased or as a beneficiary who bought the parcels of land from the deceased.
- c) That the issue in this suit is the sale of land parcel no. Kisumu/Manyatta 'A'/3298 wherein the respondent refused to honour her part of bargain hence prompting the instant case; and that those matters are totally and entirely distinct from those in Succession Cause No. 547/2005.
- d) That the parties in Succession Cause No. 547/2005 are Ian Ouma alias Anthony Ian Omondi and the respondents are Joyce Penina Adhiambo and Francis Ouma Ndalo whereas those in the instant suit are Solomon Ouko and Joyce Penina Odhiambo.
- e) That there is no similarity nor sameness in the title/claim as the order annexed to the preliminary objection is in respect of parcel no. Kisumu/Manyatta 'A'/3297 whereas the subject matter in the instant suit is land parcel no. Kisumu/Manyatta 'A'/3298. Further, the order annexed is in respect of a Succession matter whereas the instant suit is filed in the Environment and Land Court with the parties in the instant suit laying their own independent claims and not claiming through each other, hence the likelihood of res-judicata is disqualified.
- f) As to the issue of concurrence of jurisdiction, the succession court and this courts are not of similar and/or concurrent jurisdiction this the matter cannot be deemed as res judicata.
- g) That the decision by the succession court does not extinguish the appellant's claim since no judgement has been delivered on the merits of the case in any previous suit and the Court should thus afford the appellant an opportunity to be heard on full facts and on documents which were previously not adduced to enable him to seek redress.
- h) That the issue raised by the respondent as regards the non-existence of the subject matter of the suit does not constitute a pure point of law as the issue raised needs the calling of evidence to prove the alleged fact. As such, it ceases being a pure point of law

nor one that may dispose of /and or extinguish the appellants suit. The appellant relied on the cases of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696 and Oraro v Mbaja (2005) 1KLR 141** on the definition of a preliminary objection as one that is purely based on a point of law and does not deal with disputed facts.

i) That the respondent having been directed by the Court in the succession matter to transfer ¼ of the suit parcel to Anthony Ian Ouma , if the same is the same suit parcel in the instant suit, which is denied, does not extinguish and/or dispose of the appellant's claim over the parcel which he bought..

j) That on the above basis, the ruling of the trial Court ought to be overturned as its bad in law for failure to consider the import of judicial decisions and and/or submissions of the appellant's counsel in arriving at the erroneous decision.

RESPONDENTS' SUBMISSIONS

The respondents filed submissions on 14th April 2021. The highlights of the submissions are as follows:

a) That the only two grounds which the Court needs to make a determination on are; whether the learned trial magistrate correctly held that the subject matter of the suit is non-existent and whether the learned trial magistrate correctly applied the provisions of the law regarding preliminary objections.

b) That the order dated 9/12/2016 from Kisumu High Court Succession No. 547 of 2005 in the matter of the estate of Samuel Ndalo Wambare (Deceased) bequithed Land Parcel Kisumu/Manyatta/ 'A' 3298 to the Respondent and her nephew Anthony Ouma alias Anthony Ian Omondi. As a result, the Respondent effected subdivision of the suit land parcel which then gave rise to new titles, Kisumu/Manyatta 'A' /5183 and Kisumu/Manyatta 'A' /5184. The suit land parcel no Kisumu /Manyatta 'A' 3298 therefore does not exist as was rightly held by the trial Magistrate. The respondent relied on **Julius K. Atunga v Naumy Jebyegon Kemboi [2014] eKLR** where an application to strike out pleadings was allowed on account of non -existing subject matter.

c) That litigation has to come an end and that the creditor had a chance to revoke the grant as a creditor in the deceased's estate as provided for by Section 66 (d) of the Law of Succession Act but that he failed to do so and therefore lost the chance.

d) That res judicata is a question of law as provided for under section 7 of the Civil Procedure Act. In support, the Respondent has cited the cases of **Mukisa Biscuit Manufacturers v West End Distributors Ltd (1969)** and **Omondi v National Bank of Kenya Ltd &Others (2001) KLR 579**.

e) The order dated 9/12/2016 in respect of the suit property at page 121 of the resord of appeal shows that Joyce Penina Adhiambo whom the appellant claims from/under was a Respondent/Petitioner in the succession matter. The issue of ownership of the suit land was directly and substantially in issue in the former suit (succession) and this subsequent suit where the Appellant claims a portion of the suit property, that this subsequent suit is between parties under whom the parties herein claim, so is the former suit this qualifying this suit as res judicata. The respondent has relied on **China Road & Bridge Corporation v Kelvin Nyuki Machimbo (2018) e KLR**.

f) That the appellant's appeal is an abuse of the Court process and a waste of this Court's time aimed at denying the Respondent her right to own property by transmission as rightfully granted by the Succession Court, and the Respondent urges the Court to uphold the lower Court decision and dismiss this appeal with costs to the Respondent.

ISSUES FOR DETERMINATION

From the memorandum of appeal and the parties' submissions, it is my view that the appellate Court will have to make a determination on two main issues, being;

a) Whether the trial Court correctly applied the law and principles relating to Preliminary Objections

b) Whether the trial Magistrate correctly held that the suit was res judicata and that the subject matter of the suit is non-existent.

ANALYSIS AND DETERMINATION

This is a first appeal, and the court bears an obligation to evaluate and consider all the evidence tendered before the trial court and make its own independent conclusion. This duty was enunciated in **Selle v Associated Motor Boat Company [1968] E.A. 123 at page 126**, wherein the Court held 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 witness and should make due allowance in that respect."

a) Whether the trial Court correctly applied the law and principles relating to Preliminary Objections

A Preliminary Objection was described in the ***Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696*** to mean:-

“So far as I am aware, a Preliminary Objection 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. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

Further Sir Charles Nebbold, JA stated that: -

“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 improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

Similarly, the Court in Oraro v Mbaja (2005) 1KLR 141 held that;

‘Anything that purports to be a preliminary objection must no deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.’

Given the features and/or nature of a preliminary objection as espoused in the above Court pronouncements, I think it is prudent for any Court which has to make a determination on the merits of a notice of preliminary objection to first satisfy itself that what has been raised by the parties satisfy the ingredients of a preliminary objection. This was held by the Court in Kandara Residence Association & another v Ananas Holdings Limited & 4 others; Director of Survey & 3 others (Interested Parties) [2020].

I have looked at the ruling of the learned trial magistrate which is at pages 173 and 174 of the Record of Appeal. I am convinced that the trial magistrate did not examine the points raised by the Respondent in their preliminary objection with a view to finding out whether the points raised therein satisfy the requirements of a preliminary objection. The magistrate started by determining the merits of the points raised by the Respondent. It is my view that this was a faulty move to make especially in view of the fact that the appellant in their submissions, stated that the 2nd issue raised by the Defendant as to the subject matter of the suit being non-existent does not constitute a pure point of law but facts that need to be ascertained.

The above noted, and in view of the fact that this Court has a duty as the appellate Court to reconsider and evaluate the evidence that was presented before the Lower Court and draw its own conclusions as was stated in Selle v Associated Motor Boat Company (supra), this Court finds it necessary and prudent to first make a finding as to whether the points raised by the Respondent in their notice of preliminary objection actually amount to ‘preliminary objections’ in the strict sense.

I have looked at the preliminary objection at page 120 of the Record of Appeal. The Respondent has raised the following objections;

- a) That this suit is res judicata
- b) That the subject matter of the suit is non-existent.

It is my view that Res judicata is a point of law as it rips the Court off Jurisdiction to hear and determine the suit once its elements are proved. It is provided for under section 7 of the Civil Procedure Act which states 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”

With regards to the second point as to whether the non-existence of the subject matter of the suit, it goes without saying that this is a matter of fact as opposed to law and will require probing by way of evidence. This point must therefore fail to qualify as a preliminary objection.

b) Whether the trial Magistrate correctly held that the suit was res judicata and that the subject matter of the suit is non-existent.

On the basis of the Court’s finding above that existent or not of the subject matter of the suit is a matter of fact, and does not therefore qualify as a preliminary objection, the Court will not delve into the merits or otherwise of the Trial Court’s finding on the same.

As regards res judicata, the Trial Court found that;

...it is clear to my mind that the Suit against the defendant herein has once been pleaded against her in Kisumu High Court Succession Cause No. 547 of 2005 which was heard and determined in full...what is evident is that parties should not be allowed to re-litigate indefinitely. Litigation ought to come to an end.’

The Respondent in their submissions to the preliminary objection at pages 145 to 150 of the Record of Appeal indicated that the suit at the lower Court qualifies to be res judicata as the subject matter being land parcel number Kisumu/Manyatta ‘A’ 3298 is the same in both suits, the question/issue of ownership of the suit land which is in issue in the current suit was also in issue in High Court Succession Cause No. 547 of 2005, that the subsequent suit is between parties under whom the parties herein claim and that the matter was determined in finality by the order dated 9/12/2026 issued in the Succession matter. The same have been reiterated in the submissions against this appeal.

It is my view that for the Court to determine whether the conditions for res judicata have been met, it will have to look at the pleadings in the Succession Cause which have not been availed by the appellant. Indeed, the Court in *Nancy Mwangi T/A Worthlin Marketers -vs- Airtel Networks (K) Ltd (formerly Celtel Kenya Ltd) & 2 Others [2014] eKLR* stated that;

‘Unless it is abundantly clear, when res judicata is raised, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings - of the previous case and the instant case - to ascertain; (1) what issues were really determined in the previous case; and (2) whether they are the same in the subsequent case and were covered by the decision of the earlier case. One more thing; the court should ascertain whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.

I have looked at the order dated 09/12/2016 at page 121 of the record of appeal. I agree with the appellant that the Order dated 9/12/2016 alone is not sufficient to enable the Court draw proper conclusions as regards the conditions for res judicata. However, in as much as the subject property of the suit is indicated in paragraph 1 of the said order, it is clear to me that the appellant was not a party to the proceedings that gave rise to the said order. Further, the Court has not been availed with the proceedings that gave rise to that order to enable it make a finding as to whether the issues therein were the same to the issues raised by the plaintiff in the suit filed at the lower Court. The High Court in *A N M v P M N [2016] eKLR* held that;

‘In essence therefore, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a Court of competent jurisdiction.’

Based on the above, this court finds that the conditions for application of the principle of res judicata were not proved by the Respondent and the same is therefore inapplicable in the circumstances. Based on the above, I do allow the appeal with Costs to the appellant. The preliminary objection dated 1st October 2018 by the Respondent be dismissed with costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 8TH DAY OF OCTOBER, 2021

ANTONY OMBWAYO

JUDGE

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE