REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT THIKA

ELCA NO 29 OF 2019

PHILIP MBOTHE NJOROGE..APPELLANT

VERSUS

KAGUNYI RUORO..RESPONDENT

(Being an Appeal from the Ruling of the Senior Principal Magistrate's Court at Gatundu in SRMCC NO. 231 of 2014)

RULING

1. Pursuant to leave of Court granted on 25/2/2019, the Appellant lodged the instant appeal vide his memorandum of appeal dated 23/3/2019 and filed on 2/4/2019. Dissatisfied with the trial Court Ruling and orders delivered on 3/12/2018, the Appellant raised three grounds of appeal namely;

> **i. That the Learned Magistrate erred in law and in fact when she failed and/or refused to appreciate and/or analyze evidence before her thus arriving at a wrong decision.**
>
> **ii. That the Learned Magistrate erred in and in fact when she failed to find/or hold that the Court documents presented to her by the Defendant/Respondent in support of the application dated 9/2/2015 were photocopies and neither certified nor authenticated by the Court thus arriving at a wrong decision.**
>
> **iii. That the Learned Magistrate erred in law and in fact when she failed to take into consideration the plaintiff/Applicant's written submissions both on the law and the facts thus arriving at a wrong decision.**

2. The background of this appeal is that the Appellant filed his claim against the Respondent as contained in the plaint dated 22/10/2014 at page 3-5 of the Record of Appeal. He sought nullification of the Respondent's title for land parcel No. CHANIA/KANYONI/1230 (hereinafter referred to as the suit land) and he be registered as the proprietor. Further that the Respondent be ordered to clear the outstanding loan secured by the said land to enable discharge of charge.

3. The Respondent opposed the claim vide his defence dated 3/12/2014 at page 26 of the Record of Appeal. Simultaneously, the Respondent filed a notice of motion dated 9/2/2015 seeking orders that the Appellant's suit be struck out and dismissed for being Res judicata. That the dispute pitting the parties was already heard and determined in Gatundu RMCC No. 90 of 1989.

4. The motion was opposed and in his Replying Affidavit sworn on 27/9/2018, the Appellant denied knowledge of case No. 90 of 1989. That the pleadings and decree relied on by the Respondent were unauthenticated and not certified as true copies of the original. He urged the Court to allow the case to proceed for full hearing and conclusively determine the issue of ownership of the suit land.

5. The application was canvassed by way of submissions. The Court rendered its Ruling on 3/12/2018, with a finding that indeed the suit was res judicata hence this appeal.

6. On 28/4/2021, this appeal was admitted for hearing. The appeal was prosecuted by way of written submissions.

7. The Appellant through the firm of **Dola, Magani & Co. Advocates** filed submissions dated 7/7/2021. He drew two issues for determination to wit; whether the decree and eviction order relied on by the Court was admissible evidence and whether the Court erred in striking out the plaintiff's suit for being res judicata. He submitted that the best evidence rule requires production of original documents in line with Section 65 of the Evidence Act. That the decree and eviction order photocopies produced by the Respondent dated 22/6/1990 and 9/8/1990 respectively ought to have been verified as to their authenticity. This is because in the year 2007 the Gatundu Court registry was burnt down to ashes destroying all Court records. That despite reconstruction of some files, the Respondent had failed to demonstrate that

case No 90 of 1989 existed. That in light of fraudsters taking advantage of the arson, there have been cases of fake Court orders on the rise.

8. Additionally, the Appellant submitted that where a party wishes to adduce secondary evidence, the Court is obligated to examine the probative value of such evidence. That party has to lay a factual basis for producing the secondary evidence where the original document cannot be traced. Reliance was placed on Sections 66, 79 and 80 of the Evidence Act.

9. On the second issue, the Appellant reiterated the provisions of Section 7 of the Civil Procedure Act on res judicata and urged that it was not applicable to the facts of his case. He emphasized that the Court's decision to strike out and dismiss his suit was drastic and premature yet he had a plausible cause of action. The cases of **Yaya Tower Ltd vs Trade Bank Ltd C.A No. 35 of 2000 and Blue Shield Insurance Company Ltd vs Joseph Ogutu Mboya [2009] eKLR** were cited in support.

10. The firm of **Karuga Wandai & Co. Advocates** filed submissions dated 25/5/2021 on behalf of the Respondent. He reiterated that he had sued the Appellant in the Land Dispute Tribunal where the case was determined in his favour. That the Tribunal award was later adopted in Gatundu case No 90 of 1990 hence the objection on res judicata. That all the issues raised by the Appellant in his suit were conclusively determined and no appeal or setting aside of the Court order has ever been preferred. That the rationale for res judicata is meant to lock out parties from re-litigating the same issues against the same opponent when there is evidence of a final determination. He urged the Court to dismiss the appeal with costs and cited the cases of **Ukay Estate Limited & Anor. Vs Shah Hirji Manek Ltd & 2 others (2006) eKLR** and **Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017] eKLR**.

Analysis & Determination

11. In my view the main issue for determination is whether the trial Court erred in finding that the Appellant's case was res judicata.

12. It is trite that the duty of an appellate Court like in this case is to re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions. Furthermore, this Court is bound to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The Court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand.

13. Section 7 of the Civil Procedure Act states;

> **"7. Res judicata**
>
> **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."**

14. The Respondent objected to the Appellant's suit on ground that it offends the above provision. In a Replying affidavit dated the 27/9/2018 the Appellant resisted the application on the grounds that decree and eviction order dated the 22/6/1990 and 9/8/1990 respectively were not authentic; not certified as true copies of the original; the Appellant had no knowledge of the Court order; that his family was evicted while incarcerated in Prison on charges instigated by the Respondent; that he denies knowledge of Gatundu case No 90 of 1989. That the Court should look at the transfer forms, LCB Consent from the Respondent to himself, which documents have not been disputed by the Respondent.

15. The position in law as regards documentary evidence is clear. **Part III of the Evidence Act** deals with documentary evidence. **Section 64** thereof provides that the contents of documents may be proved either by primary or by secondary evidence. Further, Section 67 provides that documents must be proved by primary evidence except in the cases that are applicable to Section 68 of the Evidence Act which states;

> **"68. Proof of documents by secondary evidence**
>
> **(1) Secondary evidence may be given of the existence, condition or contents of a document in the following cases—**
>
> **(a) when the original is shown or appears to be in the possession or power of—**
>
> > **(i) the person against whom the document is sought to be proved; or**
> >
> > **(ii) a person out of reach of, or not subject to, the process of the Court; or**
> >
> > **(iii) any person legally bound to produce it,and when, after the notice required by Section 69 of this Act has been given, such person refuses or fails to produce it;**
>
> **(b) when the existence, condition or contents of the original are proved to be admitted in writing by the person against whom it is proved, or by his representative in interest;**
>
> **(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in a reasonable time;**

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of Section 79 of this Act……"

16. Judicial documents are public documents in light of Section 79(1)(iii) of the Act. Section 79 of the Evidence Act states as follows;

"Distinction between public and private documents

(1) the following documents are public documents-

(a) documents forming the acts or records of the acts-

(i) of the sovereign authority; or

(ii) of official bodies and tribunals; or

(iii) of public officers, legislative, judicial or executive, whether of Kenya or of any other country;

(b) public records kept in Kenya of private documents.

(2) All documents other than public documents are private."

17. It is trite that the standard of proof in civil cases is on a balance of probabilities. Such burden rests on he who alleges. See Section 107 of the Evidence Act provides as follows;

"Burden of proof

(1) Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of nay fact it is said that the burden."

18. The Respondent annexed photocopies of the decree and eviction order issued in case No. 90 of 1989. These documents fall within the ambit of public documents as stated in Section 79 above. The Appellant did not dispute the contention that there was an arson incidence that destroyed the Court records sometime in 2007. Invariably the Appellant does not dispute the existence of Case No 90 of 1989 except to state that he had no knowledge of the same. This does not have the same meaning that the case was non-existent because knowledge of a case and its very existence are two different things.

19. Accordingly, it would not be feasible for the Appellant to invoke Section 80 of the Evidence Act requiring the custodian of such documents to authenticate the said copies when he himself did not proffer any rebuttal. Section 80 of the Evidence Act states as follows;

"80. (1) Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

(2) Any officer who by the ordinary course of official duty is authorized to deliver copies of public documents shall be deemed to have the custody of such documents within the meaning of this section."

20. **Section 108** of the Evidence Act provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Accordingly, the burden of proof shifted to the Appellant to adduce evidence impeaching the contents of the impugned photocopies. This was the reasoning of the Learned Magistrate in reaching her finding when she observed;

"Thirdly, there is again no dispute that the previous suit was heard and determined. The plaintiff in the present suit does not dispute that indeed the suit was heard and determined. What the plaintiff disputes is the contents of the decree and the eviction orders and claims that he had never been served with the same. My view is that in such an application, the Court is concerned with whether the suit has been heard and determined and not the nature of the orders that are issued …. It is more concerned with the fact that a final order has been issued in the proceedings; and this has not been disputed. In any event, if the plaintiff's case was that he doubts the authenticity of the contents of the order, then he should be telling us what the contents should be….."

21. In the persuasive authority of Okong'o J in the case of **Anthony M. Nyamu & 12 others v Attorney General & 3 others [2019] eKLR** the Court in considering the defendants' objection against the plaintiff's production of a photocopy of an allotment letter, agreed that the circumstances of the case fell within Section 68(1)c of the Act. That since the original letter was destroyed in a fire incident and could thus not be produced in Court, dismissed the objection and allowed the photocopy as evidence.

22. In the South African case of **Transnet Ltd v Newlyn Investments (Pty) Ltd (553/09) [2011] ZASCA 44** the Supreme Court opined that there are no degrees of secondary evidence and although production of a photocopy would be more reliable than oral evidence, and failure to produce photocopy may be cause for comment, this goes to the weight and not admissibility**.**

23. I shall now turn to the core of the objection which was grounded on resjudicata. I have perused the suit RMCC No 90 0f 1989 and it is evident that the parties are the same litigating upon the same subject matter. Moreover, the matter was heard by a competent Court that issued orders including orders of eviction on the 22/6/1990. It was not demonstrated by the Appellant that these orders have been appealed against, vacated and or set aside.

24. The essence of the doctrine of res judicata as explained by Wigram, V-C in **Henderson v. Henderson (1843) 67 E.R. 313**, as follows:

> **" … where a given matter becomes the subject of litigation in, and 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 subject of litigation in respect of the matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because 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 points upon which the Court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."**

25. Allowing the Appellant to reopen the case after a hiatus of 15 years will amount to flogging a long dead horse. The Appellant is caught up with latches. I find the Learned Hon Magistrate arrived at the correct decision and I find no ground of fault.

26. Ultimately, the Appellant has failed to prove any misdirection on the part of the trial Court finding and accordingly the appeal fails.

27. The Respondent shall have the costs of the appeal.

28. It is so ordered.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS

18TH DAY OF NOVEMBER 2021.

J. G. KEMEI

JUDGE

Delivered online in the presence of;

Ms. Muchemi holding brief for Magani for the Appellant

No appearance for the Respondent

Ms. Phyllis Mwangi – Court Assistant