



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

CIVIL APPEAL NO. 22 OF 2015

BRYAN ERICK FOCKER1ST APPELLANT

ABRAHAM TUTA MUMIA.....2ND APPELLANT

GRACE RAEL MANGALA.....3RD APPELLANT

VERSUS

PROF. DR. JOSEPH HERMAN M. SSEMUJU.....RESPONDENT.

RULING.

1. The application before me is a Notice of Motion dated 8/8/2016 filed on the same date. It is expressed to be brought under Order 25 Rule 4(1) and 2 of the Civil Procedure Rules, Order 51 Rules 1 and 2, Sections 7, 6, 3A, 3, 63, 1A, and 1B of Civil Procedure Act (cap 21) and Article 159 (1) (2) and 6 of the Constitution of Kenya. The matter herein is an appeal and the applicant – **PROF. DR. JOSEPH HERMAN M. SSEMUJU** – is the respondent in the appeal while the respondent in the application – **GRACE RAEL MANG'ALA** - is also the respondent in the appeal.

2. This application was filed after the appellant's side had fully argued its appeal. When the applicant's turn to argue the appeal came, he filed this application instead.

3. Basically, the application raises the issue of **RES JUDICATA**. This is a doctrine that protects litigants from harassment through re-litigation of the same claim or issues. It helps to preserve the image and prestige of the courts by avoiding inconsistent judgments and/or rulings. This is necessary because such inconsistencies would undermine the general public's esteem for the legal order. It is too a time-saving device for the courts because it saves time that could be spent on repetition of litigation.

4. There are eight (8) prayers in the application but prayer 1, which seeks to prioritise the application and hear it at the earliest opportunity, can be considered spent. The prayers for consideration are therefore 2, 3, 4, 5, 6, 7, and 8. I set them out herein **IPISSISMA VERBA**:

Prayer 2: That the withdraw order dated 7/5/2014 of CMC Civil suit NO. 519 of 2010 by **GRACE RAEL MANGALLA** in favour of **PROF. DR. JOSEPH HERMAN SSEMUJU** makes paragraphs 7, 8, 9, 10 in the re-amended memorandum of appeal in High court Civil Appeal NO.22 of 2015, and part submissions thereof, **RES JUDICATA**.

Prayer 3: That by the ruling in High court Civil Suit NO.124 /2014 dated 17/7/2014 warrants paragraphs 7, 8, 9, 10 of the re-amended memorandum of appeal and part submissions thereof, **RES JUDICATA**.

Prayer 4: That by the ruling in High Civil suit NO. 124/2014 dated 18/6/2015 warrants paragraphs 7, 8, 9 and 10 of the appeal and part submissions thereof, RES JUDICATA.

Prayer 5: That by the withdrawal order dated 7/5/2014 of CMC Civil suit NO. 519/2010 by GRACE RAEL MANGALA in favour of the applicant makes paragraph 7, 8, 9, 10 of the re-amended memorandum of appeal, and part submissions thereof, RES JUDICATA.

Prayer 6: That in the withdrawal order dated 7/5/2014 of CMC NO. 155/2013 by GRACE MANG'ALA and Abraham Mumia in favour of the applicant Prof J.M.H SSEMUJU grounds of the appeal are RES JUDICATA and GRACE RAEL MANG'ALA does not have LOCUS STANDI.

Prayer 7: That GRACE RAEL MANG'ALA does not have a locus standi.

Prayer 8: That costs of this application be provided for.

5. The application is premised on the grounds, inter alia, that the re-amended grounds of appeal raise RES-JUDICATA issues; that the issue of ownership of the disputed land was settled by the respondents when they withdrew CMC. Civil suit NO. 519/2010, CMC Civil suit NO. 155/2013, and Civil suit NO. 167/2014; that the respondent – GRACE RAEL MANG'ALA – even confessed to have sold the land to other people, one of whom took the applicant to court in civil suits no's 201/2014 and 124/2014 and lost. Grace Rael Mang'ala is said to be without locus as she no longer owns the land.

6. The supporting affidavit accompanying the application reiterated and amplified the grounds advanced.

7. The respondent filed no response to the application. Both sides agreed on 22/9/2016 to have the application canvassed by way of written submissions. Thereafter, the applicant's submissions were filed on 23/11/2016 and the respondents submissions followed on 19/12/2016.

8. The synopsis of the applicants sub missions refer to instances of attempted fraud, with the respondent, though having sold the land to the applicant attempting to sell it yet again to another person who in turn tried to sell it to other people. This fraudulent arrangement seems to have found official endorsement from the land office but a quick response from the applicant led to a reversal and restoration of ownership to him. That fraudulent process also spawned a number of civil suits which the applicant avers to have ended in his favour. According to the applicant, the ending of those suits in his favour concluded the issue of ownership and it is therefore RES JUDICATA to raise the issue in this appeal.

9. The submissions raised three issues viz:

- Whether the grounds (7, 8, 9, and 10) are resjudicata.
- Whether the court can try a res-judicata case?
- Whether the appeal herein has a likelihood of success.

10. The applicant expounded on the issue of RES JUDICATA using statutory law underpinnings and judicial pronouncements in decided cases. In this respect, he cited section 7 of the Civil Procedure Act (cap 21) and judicial pronouncements in cases of **BENSON NGUGI VS FRANCIS KABUI KINYANJUI & others [1989] KLR 146, LOTTA VS TANAKI [2003] 2 EAP 556 (CAT0, BENJOH AMALGAMATED & ANOTHER VS KENYA COMMERCIAL BANK LIMITED CA NO. 239/04 and ABDUL KARIM HASSANAILI VS SOUTHERN CREDIT BANKING CO-OPERATION LIMTED; MSA HCC NO. 270/2005.**

11. The thrust of the applicant's exposition in both case law and statute is that litigation must come to an end; that no man should be vexed twice over the same case; that decisions of the court must be accepted; and that it would be an abuse of the court process to allow prosecution of a matter that is RES-JUDICATA.

12. The applicant then pointed out that the respondent and others in related cases have over vexed him by instituting various suits . He went on to submit that RES JUDICATA is a jurisdictional issue that should take priority before the matter is heard on merit (see **NATTALI SULE VS EVANS GUNDOHICH HCC. NO. 52 OF 1988**) and that RES JUDICATA is not confined only to issues already decided but to issues also which ought to have been raised in a case for decision (see **GREENHALGH VS MILLARD (1974) 2 ALL ER 255 P 25**).

13. Ultimately, the applicants submissions were that the grounds of appeal (No's 7, 8, 9 and 10) are res-judicata and the court should declare them so; that the court has no power to try res – judicata cases; and that the grounds of appeal “ *are quite hopeless as indeed they have no likelihood of success*”

14. The respondent's submissions is that the applicant has gone sub judice by raising the issue of RES JUDICATA in the manner he has done instead of raising it in his arguments regarding the whole appeal.

15. I have considered the application and the rival submissions. The applicant's beef is with grounds 7, 8, 9 and 10 of the re-amended grounds of appeal. It is therefore necessary to know what these grounds are and I will state them in summary. Simply stated, the grounds are that it was a mistake to award special damages to respondent given that he had not proved ownership of the land (ground 7); that the defendants counter-claim should not have been allowed as the transaction between the parties had no consent of Land Control Board (ground 8); that the alleged seller, GRACE RAEL MANG'ALA, had not sold any land to the defendants and the defendant's claim was therefore fraudulent (ground 9);and that there was material contradiction as to how much land the defendant bought and that contradiction rendered the counter claim untenable (ground 10).

16. I have stated elsewhere in this ruling what RES JUDICATA aims to achieve. It is necessary to appreciate how it operates. And its operations are premised on two simple postulates namely; (a) That issues or cases decided on merit should not be re-litigated and (b) that issues that ought to have been raised for consideration in a given case but were not raised cannot be raised in another or later case for consideration.

17. RES JUDICATA cannot be raised where the issues or case was not decided on merit. And a decision on merit is one where the court has exercised its judicial mind after due consideration of what is presented and made an informed decision. It cannot also be raised where the issue or case is one on appeal or where the court is invited to review or revise a decision. Further it is also incompetent to raise it where the matter was merely withdrawn, abandoned or struck out. All this is because the merits of the case have not been considered by the court.

18. It is with all this in mind that I am constrained to observe that the application herein has several shortcomings and/or problems. Consider this:

a) What the court is handling is an appeal. And the appeal as brought is from the decision of the lower court. The applicant herein does not seem to appreciate how RES JUDICATA operates. RES JUDICATA does not lie where what is being challenged is a decision of the lower court. It is the indisputable right of the aggrieved parties to challenge such decision on appeal. The applicant has mentioned some High court matter. But this appeal is not about them.

b) The lower court cases forming the basis of raising RES JUDICATA were merely withdrawn, not decided on merits. RES JUDICATA applies where the issues complained of were decided by the court on merits.

c) As a general rule, one cannot raise the issue of RES JUDICATA if one has not raised it first in the pleadings. When the re-amended grounds of appeal were filed herein, the applicant responded by filing grounds of opposition in writing. The applicant should have intimated his intention to raise the issue in his filed grounds. He didn't do so. He instead chose to surprise the respondent (appellant) by bringing the issue vide a Notice of Motion. That was improper.

d) The manner of raising the issue is suspect. The appellant had argued its side of appeal. It was the respondent's turn to present his arguments. Instead of doing so, he filed this application. This is something done with hindsight. The applicant had gained the opportunity of listening fully to the other side. He had that advantage and by filing the application, he seems intent on stealing a march on the respondent (Appellant).

e) The court expressed its desire vide a ruling dated 1/12/2015 to have the appeal heard expeditiously. It did so after observing that this is a matter where '*things seem to be in a state of flux*'. The hearing of the appeal herein had entered the final stage. But the applicant herein vindicated the court in its observation by filing this application. The application gave the appeal a strange twist. By picking grounds 7, 8, 9 and 10 as the basis of raising the issue of RES JUDICATA, the respondent is inviting the court to decide the appeal partially, not fully. The other grounds would have to come later. The appeal then would not be concluded. This is undesirable.

19. It is also important to note that while the main thrust of the application rests on the issue of RES JUDICATA, the applicant also raises the issues of LOCUS STANDI and SUB JUDICE. It is not clear why these can't be raised in response to the main appeal. It is not also clear why the court is being invited to consider whether the appeal has chances of success on the basis of grounds 7,8, 9, and 10, when the response to the other grounds of appeal has not yet been made.

20. The upshot is that the application is one that must fail. I hereby dismiss the application with costs.

A.K. KANIARU,

JUDGE.

DATED AND DELIVERED ON 7TH DAY OF MARCH, 2017.

IN THE PRESENCE OF;