



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 624 OF 2011

DAVID STEPHEN KAMIRI APPELLANT

VERSUS

WASHINGTON NJOGU KARIUKIRESPONDENT

(Being an appeal from the ruling of the lower court at Milimani Commercial Court before Hon Boaz Olao, CM in Civil Case No. 4302 on 30th November, 2011)

JUDGMENT

On 30th November, 2011 the lower court gave a ruling on an application filed by the appellant herein dismissing the said application on the basis that it was *res judicata*. The appellant was aggrieved by the said ruling and filed this appeal against the respondent. The appeal is opposed by the respondent and both parties have filed submissions.

A brief background in this matter is important. The suit in the lower court was filed against one Susan Wairimu Kamiri. The present appellant David Stephen Kamiri Mbiriri applied to be joined as an interest party. This was allowed by consent of the parties. The matter proceeded for hearing in the lower court, and the present appellant was represented by counsel when the judgment date was given. The judgment was then delivered on 17th October, 2007 in the presence of both counsel for the appellant and the respondent.

After some time, about four years thereafter, the wife of the appellant, who was the defendant in the lower court filed an application on 26th January, 2011 seeking orders of injunction against the respondent in dealing with plot Nos. N235 and N 235B. There were also orders sought for stay of execution and setting aside the judgment. The said application was argued before the trial magistrate whereby the appellant was present.

On 21st July, 2011 the lower court gave a ruling dismissing the application. Following the said dismissal, the present application was filed. The application by the appellant sought an order of stay of execution of the decree issued against the defendants barring them from interfering with, dealing or in any manner interfering with plot Nos. N235 and N235B.

In dismissing the appellants application dated 9th August, 2011 the lower court had the following to say,

“The fact that a case proceeded ex parte does not necessarily render the decree or judgment that follows to be defective. I notice from my record that on 17/9/2007, the 2nd defendant/applicant herein who was the interested party was represented by Mr. Nasir who was holding brief for his advocate Miss. Nyandieka and the court fixed the judgment date for 17/10/2007. If the case

proceeded on 1/8/2007 in the absence of the 2nd defendant/applicant, the court must have been satisfied that it was proper to do so and if there was good reason to explain the absence of the 2nd defendant/applicant during the hearing of 1/8/2007, then I do not see the reason why the advocate (M/s Nasir) who was present in court on 17/9/2007 when the magistrate was fixing a judgment date, could not raise that issue at that earliest opportunity. The 2nd defendant/applicant is clearly guilty of laches.

On the issue of res judicata, I have already found that the current application seeks substantially the same orders as those in the previous application filed by the 1st defendant and dismissed in the ruling dated 21/7/2011. Both applications were in respect of plot Nos. N235 and N235B situated at Ruai Embakasi. In his affidavit in support of this application, the 2nd defendant/applicant has deponed in paragraph 2 that the 1st defendant is his wife. The 1st defendant is the one who filed the earlier application which was dismissed on 21/7/2011. The two defendants herein are therefore litigating as man and wife claiming the same property in a matter which was heard and determined by a judgment delivered herein on 17/10/2007 i.e. some four (4) years ago.

The plea of res judicata is properly raised in this matter and I uphold it. In the circumstances, the 2nd defendant /applicant's notice of motion dated 9/8/2011 is hereby dismissed with costs to the plaintiff/respondent."

In the memorandum of appeal dated 6th December, 2011, the appellant faulted the lower court for dismissing the appellant's application upon a preliminary objection on the ground that the said application dated 9th August, 2011 was *res judicata* as between the appellant and the respondent. The appellant also faulted the lower court for ignoring his submissions relating to the respondent's preliminary objection, yet the application sought to set aside the judgment that was prematurely entered upon a hearing conducted before the pleadings were closed, and summons to enter appearance had not been served so as to allow the appellant to file his defence and the matter be heard on merit.

In the circumstances, the appellant stated he had been shut out from litigation unlawfully without service of any hearing notices and without a hearing. It is true that the respondent raised a preliminary objection. It is trite law that a matter may be decided conclusively on a preliminary objection

In the case of Mukisa Biscuit Manufacturing Company Limited Vs West End Distributors Limited (1969) EA page 696 at page 700 Law, JA had this to say,

".....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."

Decided cases have upheld the position that, such objections should be raised at the earliest opportunity so as to give notice to the other party and the court, to save judicial time which may be consumed by listening to parties on a matter that may be finalised summarily.

Section 7 of the Civil Procedure Act reads as follows,

"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."

The application brought by Susan Wairimu Kamiri was a suit going by the definition of a 'suit' in the Civil Procedure Act. It related to the same subject matter contained in the application by the appellant. That is to say plot Nos. N235 and N235B. As at the time the determination on that application was being

made, the appellant herein was already a party to the proceedings, having been joined as an interest party.

Indeed, his name appears in the decree issued on 7th October, 2007. It is also clear that Susan Wairimu Kamiri and David Stephen Kamiri Mbiriri are husband and wife. They are litigating upon the same property and there is no doubt whatsoever that the two applications addressed the same subject matter. The decision upon the application by the 1st defendant was clear unambiguous and conclusive. There is no doubt therefore, that the lower court decision made on 30th November, 2011 was informed by the previous decision of a court of concurrent jurisdiction. The lower court could not have arrived at a different conclusion.

In that regard therefore, I consider the application by the appellant dated 10th August, 2011 and this appeal to be an abuse of the court process. Accordingly this appeal is hereby dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 6th Day of April 2017.

A. MBOGHOLI MSAGHA

JUDGE