



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELCA NO. 8 OF 2020

JOSEPH GATHONJIA GATUNI..... APPELLANT

VS

JAMES KABATHI MWANGIRESPONDENT

**(Being an Appeal from the Ruling of the Learned PM E MURIUKI NYAGAH issued on 28th July, 2020 in CMCC No 21 of 2020-
Muranga)**

JUDGMENT

1. The Appellant filed suit in the lower Court against the Respondent claiming inter alia a permanent injunction against the Respondent from claiming/interfering with the Plaintiff's suit land LOC 11/MARAGI/3509 as well as an order restraining the Respondents from damaging the developments on the suit land.
2. The Defendant filed his statement of defence and followed it with the notice of Preliminary Objection filed on the 9/6/2020 as follows;
 - a. That this matter is resjudicata, the subject matter of the suit having been dealt with by the **HCCC No 21 of 2007 in James Kabathi Mwangi T/A Tangerine Auto Hardware Vs Kenya Commercial Bank Limited**
 - b. The entire suit is incurably defective a non-starter and an abuse of the process of the Court.
3. On consideration the Court upheld the objection and struck out the suit for being incompetent.
4. Aggrieved with the decision of the Learned Principal Magistrate the Appellant appealed on the grounds that;
 - a. The Learned Principal Magistrate erred in ruling that the suit in the lower Court is Res-judicata in view of NAIROBI H.C.C. No. 21 of 2007 while the converse is true.
 - b. The Learned Principal Magistrate erred in law and fact in failing to appreciate that the parties in the two suits are different from each other and that the parties herein are not litigating under the same title.
 - c. The Learned Principal Magistrate erred in ruling that the orders/reliefs sought in MURANG'A CMCC ELC SUIT No. 21 of 2020 are substantially the same as in Nairobi H.C.C. NO. 21 OF 2007.
 - d. The Learned Principal Magistrate erred in law and fact in that Section 7 of the Civil Procedure Act is clear that for a matter to be declared resjudicata the parties must be the same. In this instant case the parties in the two suits are not the same.
 - e. The Learned Principal Magistrate erred in law and fact in failing to find that the Preliminary Objection did not meet the threshold of Section 7 of the Civil Procedure Act.
 - f. The Learned Principal Magistrate erred in law and fact in failing to rule that the Preliminary Objection did not meet in the stringent requirements of the law governing the Principle of resjudicata and that the reliefs sought in the lower Court were substantially different from those sought in NAIROBI HCC 21 OF 2007.
 - g. The Learned Principal Magistrate erred in law and fact in failing to appreciate the fact that the Defendant in the lower Court had lodged a Counter-claim against the Appellant herein and that the issues raised in the suit and counterclaim could only be canvassed

through a full trial.

h. The Learned Principal Magistrate erred in law and fact in ignoring the submissions put forth by the Appellant and particularly so the submissions that the suit in the lower Court did not fall within the ambit of Section 7 of the Civil Procedure Act and that Appellant did not participate in Nairobi H.C.C 21 of 2007

i. The Learned Principal Magistrate erred in law in failing to appreciate that no orders were issued in respect of the suit land herein LOC.11/MARAGI/3509 by the High Court in its judgment and for a good reason that the Appellant was not a party to the suit in the High Court and that no adverse orders could issue in respect of this land when he did participate in the proceedings

j. The Learned Principal Magistrate erred in law and fact in arriving at a decision which goes against the grain of established tenets of legal jurisprudence.

5. The Appellant sought the following orders;

a. The Appeal be allowed.

b. The orders made by the lower Court on 28/7/2020 be vacated and set aside.

c. The suit in the lower Court do proceed to full trial before another magistrate.

d. The Respondent do bear the costs of this Appeal.

6. Parties elected to canvass the Appeal by way of written submissions which I have read and considered.

7. The Appellant submitted that he was not a party in HCC No 21 of 2007 and thus CMCC No 21 of 2020 is not resjudicata. Further that the suit land was not the main subject matter having been mentioned by the Court in passing or as it were per incuriam and not in substance. That no orders were made directed at the suit land in the High Court case. That the issues in both suits are different. He urged the Court to dismiss the Appeal.

8. The Respondent submitted that the suit land was a subject of the HCCC 21 of 2007 where the Court pronounced itself and agreed with the Respondent that the suit land was sold by the bank unlawfully. That by that decision the fate of the suit land was determined by the Court and is not open for the lower Court to reopen the case.

9. In addition, the Respondent argued that the Appellant has already filled an application in the HCCC No 21 of 2007 to be enjoined in the suit and therefore the suit in the lower Court becomes subjudice. That entertaining this suit creates two parallel suits running at the same time, something that is not permitted by Section 6 of the Civil Procedure Act.

10. That the suit in the lower Court amounts to an abuse of the process of the Court as it seeks to duplicate litigation against public policy that Advocates that litigation must come to an end.

11. The key issue for disposal of this Appeal is whether the Preliminary Objection is a pure point of law; whether CMCC No 21of 2020 is resjudicata; whether the decision of the lower Court should be upheld; who meets the cost of the objection.

12. In the case of **United India Insurance Co Ltd Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd –Vs- East African Underwriters (Kenya) Ltd [1985] eKLR** the Court of Appeal urged the Appellate Court to resist the temptation of readily substituting the discretion of their members for that of the trial Court. It stated: -

"The Court of Appeal will not interfere with a discretionary decision of the judge Appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. [It] is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

13. Section 7 of the Civil Procedure Act provides 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”.

14. The doctrine of resjudicata literally means a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgments. See the decision in the Indian case of **Subramanian Swamy V state of T.N AIR 2015 SC 460**. The doctrine is founded on high public policy intended to achieve two objectives namely; there must be a finality to litigation and that an individual should not be harassed twice over on account of the same litigation. It underscores the fundamental doctrine of law that there must be an end to litigation.

15. In order to decide the question whether a subsequent proceeding is barred by resjudicata it is necessary to examine the objection in

reference to;

- a. Matters directly and substantially in issue in the former suit.
- b. Whether the parties are the same or parties under whom they are or any of them claim.
- c. Litigating under the same title.
- d. Competence of the Court.
- e. Matter has been heard and finally decided.

16. The subject matter of the lower Court suit and the HCCC No 21 of 2007 is inter alia parcel No LOC11/MARAGI/3509. In the lower Court the Appellant avers that he is the registered owner of the suit land having purchased it from Kenya Commercial Bank Limited through a public auction. It is commonly acknowledged that the Respondent had offered the suit land amongst other lands to Kenya Commercial Bank to secure some financial facilities. The said bank sold the suit land to recover the unpaid loan. In HCCC No 21 of 2007 the Court determined that the suit land was sold by the bank unlawfully.

17. It is true that the parties in HCCC No 21 of 2007 were the Respondent and the Kenya Commercial Bank Limited. The nexus between the Appellant and the Respondent in this case is the suit land that was declared by the Court to have been sold unlawfully to the Appellant by the bank. In both cases therefore the parties are litigating under the same subject matter.

18. The issue in both cases revolve around the ownership of the subject land. In HCCC No 21 of 2020 the Court was clear that the suit land was unlawfully sold by the bank without any justification.

19. Having perused the judgement of the High Court I am satisfied that the Court that determined the matter in respect to the subject matter was a competent Court and the issue of ownership was heard and determined.

20. The Court has noted that indeed the parties in this Appeal have submitted themselves to the jurisdiction of the High Court and filed various applications; the Appellant filed an application dated 10/7/2020 seeking orders to be enjoined in HCCC No 21 of 2007 while the Respondent filed an application dated the 26/5/2020 seeking eviction of the Appellant from the suit land.

21. If the issue of ownership were to be dealt with before the two Courts (this court enjoying appellate jurisdiction and the High Court in its original jurisdiction) at the same time, there is every possibility that the Courts could reach inconsistent verdicts. If that were to happen the Courts would have been put into disrepute. Meanwhile, if the two cases were left to run side by side in two different Courts that would be a waste of precious judicial time. In order to ensure that judicial time is utilized in an optimum manner and also to safeguard the integrity of the judiciary, by removing the possibility that two Court's of concurrent jurisdiction might arrive at inconsistent decisions on the same subject matter, this suit should be struck out. See the case of **Bundotich v. Managing Director Kenya Airways Authority and Another (2007)2 E.A 90**.

22. In view of the circumstances of the parties as set out in para 20, it follows that the suit in the lower Court is subjudice given that the HCC No 21 of 2007 is still actively being pursued by the parties. It is against public policy to allow parallel proceedings in different Courts. See **Bundotich supra**.

23. The finding of the Court is that the Learned Principal Magistrate applied the law correctly and arrived at the correct decision in upholding the Preliminary Objection. I find no reason to fault his decision.

24. The Appeal is dismissed with costs to the Respondent.

25. It is so ordered.

DATED, SIGNED & DELIVERED AT MURANGA THIS 29TH DAY OF OCTOBER 2020.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Ms Macharia HB for Njoroge for the Appellant

Ms Mucheru for the Respondent

Njeri, Court Assistant.