N THE COURT OF APPEAL

AT NAKURU

(Coram:gachuhi, Apollo Jja & Gicheru Ag JA)

CIIVIL APPEAL No. 1 OF 1986

NGUGI.....APPELLANT

VERSUS

KINYANJUI AND 3 OTHERS.....RESPONDENT

JUDGMENT

(Appeal from a ruling of the High Court at Nakuru, Omolo Ag J, in HCCC No 73 of 1984,

dated 1st July 1985)

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January 27, 1989 the following judgments were delivered.
Gachuhi JA. The facts of this appeal are stated in the judgment of Apaloo JA in which I had the advantage of reading in draft.

In law, any litigation has to come to an end. Once a decision has been reached by a competent Court, it cannot be re-opened to be started all over again unless the decision reached has been set aside. Any decision reached, if not set aside, it cannot only be challenged on appeal and cannot be challenged in any inferior court, tribunal or in the same court except in case of review. The law will not allow any dispute between the same parties or between those who claim through them to re-open the dispute while the judgment still remains on record.

As set out in the judgment of Apaloo JA the fourth respondent in this appeal filed a land suit against the appellant claiming the ownership of a plot of land comprising of 26 acres situated in the Gilgal West Settlement Scheme. The 4th respondent was supported by some of the appellant's brothers. They all gave evidence that the respondent bought the land which said land was registered in the name of the appellant in trust to them. The appellant who did not counterclaim for possession successfully defended their claim. Kneller J (as he then was) having heard all the evidence found that the appellant purchased the land himself without the aid of the respondent. He dismissed the fourth defendant's claim. There was no appeal against the said judgment. Had the appellant counter claimed for possession and eviction of the respondent from the land he could have obtained judgment for such claim in his favour. It may be that he did not foresee any problem since the fourth respondent's claim was dismissed. He allowed the respondents to continue remaining in possession since he had originally invited them to stay with him on the land.

There were certain events that erupted as a result of which the appellant was physically assaulted. He

decided to move out of the land and live on another land. There is no cordial relationship that exists between the parties any more. The appellant at one time sought to get Shs 10,000 in exchange of 3 acres used by each of the respondents. The money was required to pay the Agricultural Finance Corporation's loan. The respondents state in an affidavit that they accepted the proposals and paid the money but the appellant does not wish to honour his proposal. This has not been proved. The appellant filed this suit for eviction and injunction restraining the respondents from using the land. These are the reliefs the appellant could have obtained had he counterclaimed for them in the suit decided by Kneller J in Nairobi High Court Civil Suit No. 697 of 1974.

The respondents filed their defenses in this suit claiming the ownership of the land, the same claim which was dismissed by Kneller J. The appellant filed notice of motion for striking out the defences because they were frivolous and vexatious. In paragraph 4 of his affidavit in support of the motion stated that:

> "The matter in issue as far as ownership is concerned has been decided in High Court Case No. 697 of 1974."

When the motion came up for hearing before Omolo Ag J, he did not hear it, and if he did, there is no record of any submission. The record shows an order made referring the matter to arbitration by the Provincial Commissioner because the parties are very close relatives. The appellant disputes this. The reference order is one of the grounds of appeal.

Here, with due respect, the Judge erred in not hearing the motion before him because the doctrine of *res judicata* had been raised in the affidavit. This is a point of law as enacted in section 7 of the Civil Procedure Act (Cap 21). There is no way of going round what the Legislature has forbidden. The arbitration award recommended sub-division. This recommendation was to nullify the judgment of the High Court as pronounced by Kneller J to which there was no appeal. Parties cannot confer jurisdiction unto themselves to refer the matter to arbitration in the light of the matter which has already been adjudicated. There was an application to set aside the award, but the Judge entered judgment in terms of the award.

Whether the arbitration was conducted properly or not, the law is clear in the matter. The claim for ownership by the respondents was res judicata. The Counsel for the respondents concede in this appeal that the doctrine of res judicata applies and that the respondents do not have defences to the suit. That being the position the reference to arbitration and whatever followed thereafter is a nullity. The judge ought to have heard the application for striking out the defences and once defences were struck out there would be nothing left except to give effect to the prayers in the plaint. On my part, I would allow this appeal and I would enter judgment for the plaintiff as prayed in the plaint for eviction and perpetual injunction but for mesne profit I would allow it as from the date of filing the suit. As Apaloo JA and Gicheru Ag JA also agree, the order of the Court will therefore be that the appeal is allowed and judgment for eviction and injunction is entered for the plaintiff as prayed in the plaint. The plaintiff will have mesne profits at the rate of Shs 40 per acre per year from the date of filing suit till the date of possession. The respondents/defendants will have time up to the end of March 1989 to vacate from the land by which time they will have harvested their crops which may be already planted but they shall not plant anymore. The appellant will have his costs of this appeal and of the proceedings in the High Court.

Apaloo JA. The only question raised in this appeal, is whether the wellknown doctrine of *res judicata* precludes the issue of the ownership of the suit land and the right to its occupation joined between the parties from being relitigated in the proceedings which culminated in this appeal. Although only a common law doctrine whose policy objective is the prevention of repetitive litigation, it was put on firm statutory basis by section 7 of the Civil Procedure Act which enacts 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 and has been heard and finally decided by such court."

It seems to me that if a court of law is statutorily barred from trying such an issue, it cannot go behind that

injunction by remitting that issue to be relitigated at an arbitration. The question is; has the ownership of the suit plot been heard and finally decided between the parties? To answer this, one must turn to the facts. The suit plot which measures 26 acres, is in the Gilgil West Settlement Scheme. It is plot 49. It is registered in the name of the appellant. The appellant is the son of the 1st respondent and the other respondents are his children and privies in law.

The parties seem to have lived and occupied various parts of that land without incident. Sometime in 1974, there seems to have been some serious differences between the appellant on one hand and his father the 1st respondent and the other respondents on the other. So on April 26, 1974, the 1st respondent brought a plaint against the appellant in the High Court and sought judgment against him for:

> (a) A declaration that the appellant holds the plot in trust for him.
> (b) An order that the appellant transfers the same plot to himself – the first respondent.

The avowed basis for the trustee-beneficiary relationship which the 1st respondent asserted, was that it was the 1st respondent who put the appellant in funds to make the purchase and although the title was registered in the appellant's name, he, in law, held it on a resulting trust for him. The other respondents sided with their father to make this assertion and some testified in court on his behalf.

The appellant's case was that he in truth bought the plot with his own money and obtained the conveyance in his own name and for his sole benefit. He said he only permitted the respondents who are his father and brothers to live on the land with him. He denied that they had any proprietary interest in that land and asserted that he was the sole owner of the land. Which of these contrary was the truth, was examined in a full and well-considered judgment of Kneller, J (as he then was). He found that the truth lay with the appellant who was the defendant in the action. He accordingly held that the 1st respondent's claim failed and he proceeded to dismiss it. On the available evidence, this judgment has not been vacated on appeal and fully and finally settled the question of ownership of the suit plot in the appellant's favour. It is plain that if the appellant had counterclaimed in that suit for declaration of title and recovery of possession of portions of the land then in occupation of the respondents, his success would have been a foregone one. This judgment was delivered on July 2, 1976.

The evidence shows that at some unspecified period before or after the judgment of the High Court, there was some incident involving the appellant and the respondents resulting in personal injury to the former. So he left the land. The appellant seems to have charged the land to the Agricultural Finance Corporation to obtain a loan and in February 1984, he wrote to the respondents and offered to grant them each 3 acres in return for a payment of Kshs 10,000 per head. He said he was desirous of liquidating the AFC loan. He warned that if they refused the offer, he may feel compelled to repossess the suit plot. The respondents refused to budge.

Accordingly, on June 5, 1984, the appellant brought against them the present suit and sought orders for their ejectment, an injunction restraining them from entering or remaining in possession of the land in dispute and for mesne profits of shs 40 per acre from 1974 to the date each vacates the plot. On being sued, each of the respondents filed a statement of defence in which each denied that he was a licensee on the suit plot but averred that the plot was purchased by the 4th respondent their father and although it as registered in the appellant's sole name, he was a trustee to them. For their part, each respondent sought an order for sub-division of the plot. It is to be noted that this was the same issue they raised in the 1974 action and which Kneller, J solemnly pronounced against them.

It is therefore not surprising, that on receipt of the statements of defence, the appellant moved to strike them out as frivolous and vexatious. The main ground on which the appellant took his stand, was the 1974 judgment. As the appellant put it in paragraph 4 of his affidavit – that the matter in issue as far as ownership was concerned has been decided in High Court case No 697 of 1974.

For some reason which is not exactly clear, the learned judge did not deal with the motion for striking out. What he did instead, was to refer the parties to arbitration. The judge conceded that the land appears to be registered land, which would not ordinarily have been remitted to arbitration. But he said "the parties

have agreed and I hereby refer the matter to the Provincial Commissioner, Rift Valley to hear and settle the matters in dispute if he can".

It is worthy of note that in the light of the pleadings which show that the dispute has already been investigated by a court of competent jurisdiction and the issue of ownership finally concluded, and in view the fact that an application was pending before him to dispose of the matter on that ground, the learned judge thought it right to refer the matter again for the issue of ownership to be re-opened. Surely, the only live issue between the parties, was whether the ownership of that plot had been adjudged in the appellant's favour and if so adjudged, whether the appellant was entitled to the consequential reliefs of (a) ejectment; (b) Injunction restraining the respondents from remaining on the plot and (c) mesne profits. With respect to the learned judge, a blank referral to arbitration was, on the facts of this case, unhelpful. It is not surprising therefore that the arbitrator re-opened the question of ownership and in an unreasoned "findings" sought to find the very opposite of what the learned judge found. The Arbitrator then proceeded to make his award on the basis of his somewhat unenlighting "findings". When the award was returned to the court, the learned judge rejected an application to set it aside and proceeded to record that:-

> "I now enter judgment in the dispute as per the terms of the award. It is so ordered."

The upshot of this somewhat unorthodox proceedings, is that the 1974 judgment of the High Court was reversed, so to speak, by the back door. The appellant invites us to say that the learned judge was in error in referring the case to arbitration as the difference between them have been concluded in the 1974 judgment. As was put in ground one of the memorandum of appeal:-

> "The learned judge erred in law in referring the case to arbitration as the matter was already res judicata the issues having been dealt with between the same parties in Nairobi HCCC No 697 of 19764."

Two questions fall to be considered on this complaint namely first, was the matter res judicata, two, if it was, was the judge right in referring it to arbitration? As to the first question, the requirements of the legal doctrine of res judicata are so well-known that it would be purely pendatic for me to burden this judgment by setting them out. Clearly, first, the subject – matter of both suits was the same, namely, plot No 49 Gilgil West Settlement Scheme, second, the parties were the same, that is, the appellant on one side and his father and some of his brothers on the other, third, who owns the plot in dispute? Was it the appellant who financed it from his own pocket, or was it the appellant's father who provided the purchase money? These questions were raised in both suits and were decided as clearly as anything can be decided in the 1974 action. The only difference is that in the two suits, the parties changed roles. In the earlier action, the appellant was the defendant, in this one, he was the plaintiff. Nobody suggests that that makes a legal difference to the concept of res judicata. I must conclude therefore that the issue of the ownership of the suit plot was *res judicata* and the appellant was right in so contending.

The next question is; if the suit was *res judicata*, ought the judge to have referred it to arbitration? I think on principle, he ought not to have done so. The issues on which the parties were in disagreement, have been finally adjudged. The only binding judgment that was given in this case was the one pronounced by Kneller, J. If section 7 of the Civil Procedure Code bars, in mandatory terms, the court from any fresh trial of the concluded issue, the learned judge cannot competently get round that bar by obtaining the consent of the parties to arbitration or inveigling them to do so. The spirit, if not the letter of Act 21, forbids it. The appellant put his challenge of the judge's referral of this suit to arbitration in his second ground of appeal in these words:-

> "The learned judge erred in law in entertaining the arbitrators award and making it an order of court as in doing so, he purported to be deciding on matters which were *res judicata*, the same having been disposed of in Nairobi HCCC No 697 of 1974."

In my opinion, that puts the appellant's objection to the arbitration "judgment" with perfect accuracy. Counsel for the respondents did not attempt to meet that objection by argument for the very sufficient

reason that that contention was unanswerable. I think, therefore, that the respondents were estopped per *rem judication* from laying any legal claim to the appellant's ownership of the plot in dispute or asserting any adverse claim to any part of it. At all events, section 27 of the Registered Land Act, vests in the appellant as the registered proprietor of the suit plot, "the absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto". One such right, is the exclusive use and occupation of the land and the right to permit its user.

The last question is whether the appellant is entitled, as a matter of law, to evict the respondents from the suit land and thereafter keep them out. On the pleadings, the respondents occupied the land with the leave and licence of the appellant, the sole beneficial owner. But while on the land, the respondents disputed his ownership and set up title adverse to his and indeed went to law with him. In the result, they were defeated. They accordingly forfeited their right to remain on the land. The appellant, is accordingly entitled to evict them and thereafter, an injunction should go to restrain them from entering or in any way molesting the appellant from the quiet enjoyment of his property.

I think, therefore that the appellant is entitled as against the respondents to all the reliefs sought in the plaint. But I would not make an immediate order for their eviction. Now that the dust of battle has settled and the feeling of acrimony reduced, I think the respondents should be permitted to attorn tenants to the appellant should they so wish. Perhaps, the parties would agree on what tems the respondents will continue to live on the land in dispute. They should have up to March 31, 1989 to do this. Should the parties fail to reach agreement by that date, I would order that the respondents be evicted any time after that date and that the appellant recover vacant possession of the suit plots.

I think the respondents should also pay reasonable sums by way of mesne profits for their use and occupation of the land. The appellant claims shs 40 per acre per year from 1974 till the date of vacation of the plots. That sum is eminently reasonable and I would award him that sum but not from 1974 as claimed, but from the date of the institution of this suit, namely, June 1 1984.

I would accordingly allow the appeal and make the orders indicated in this judgment. The appellant is entitled to his costs here and below and I do so order.

Gicheru Ag JA. I have read the draft judgments of Gachuhi, JA and Apaloo, JA and I agree that this appeal should be allowed. I also agree with the orders proposed by Apaloo, JA.

Dated and delivered at Nakuru this 27th January, 1989

J. M GACHUHI

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JUDGE OF APPEAL

F.K APOLLO

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JUDGE OF APPEAL

J.E GICHERU AG

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR