



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

E.L.C APPEAL NO.7 OF 2018

REBECCA CHEPNGENO CHUMO (Suing on behalf of the estate of

Kipsigei Arap Cheple alias Elija Kipsigei Cheplel).....APPELLANT

VERSUS

CHRISTINA CHEPTOO CHUMO.....RESPONDENT

JUDGMENT

Introduction

1.The Appellant herein Rebecca Chepngeno Chumo filed this appeal against the Ruling of Hon. B.R Kipyegon Senior Resident Magistrate in Kericho CMCC No . 3 of 2018 delivered on 19th September 2018. The appeal is based on the following ground

i. That the learned Trial Magistrate erred in law and in fact by finding that the judgment of T. K.A MIBEI, Resident Magistrate in RMCC No. 27 of 1985 between Christina Cheptoo as Plaintiff and Rebecca Chepngeno as the defendant determined the fate of the parties in Kericho MCL & E No. 3 of 2018.

ii. That the learned Trial Magistrate erred in law and in fact by finding that the copy of Grant of Letters of Administration Intestate issued by the Kericho Resident Magistrates' Court vide Succession Cause No. 70 of 1985 had determined the fate of the parties in Kericho MCL & E No. 3 of 2018.

iii. That the learned Trial Magistrate erred in law and in fact by finding that the parties in RMCCC No. 27 of 1985 and Kericho MCL & E No. 3 of 2018 were the same.

iv. That the learned Trial Magistrate erred in law and in fact by failing to consider the written submissions of the Appellant dated 13th September r2018 and the Appellant's evidence on record.

v. That the learned Trial Magistrate erred in law and in fact by finding that the suit in Kericho MCL & E No. 3 of 2018 is res judicata.

2. The Ruling which is the subject matter of this appeal was made pursuant to a Notice of Preliminary Objection dated 22nd June 2018 filed by the Respondent herein. The Preliminary objection was made on the ground that the issues pleaded in the suit were res judicata, the same having been directly and substantially in issue between the same parties in Kericho RMCC No. 27 of 1985 wherein the issues were determined and adjudged by the Honourable Court.

3. The said Preliminary Objection was canvassed by way of written submissions.

4. In his submissions counsel for the Respondent argued that the Defendant had instituted a suit against the Plaintiff in the year 1985 vide RMCC No. 27 of 1985: Christina Cheptoo v Rebecca Chepngeno regarding the ownership of land parcel number KERICHO/KIPCHIMCHIM/1598 and the same was heard and a judgment and decree was delivered on 2nd May 1986. It was his submission that the same parties were now before the court in MCL & E No. 3 of 2018 litigating over the same subject matter. Although the pleadings in RMCC No. 27 of 1985 are not attached, the copy of judgment and Decree dated 2nd May 1986 which is in the record of Appeal shows that indeed the parties were the same and the court confirmed the decision of the panel of elders filed in court on 10.12.85 to the effect that Christina Cheptoo Chumo do inherit the parcel of land known as KERICHO/KIPCHIMCHIM/1589 registered in the name of the deceased husband Elijah Kipsigei Arap Cheplel.

5. Counsel relied on the case of **Bernard Mugo Ndegwa v James Githae & 2 Others (2010) eKLR** where the Court held that the party alleging *res judicata* must show that:

- a) *The matter in issue is identical in both suits*
- b) *The parties in the suits are substantially the same*
- c) *The is concurrence of jurisdiction for the court*
- d) *The subject matter is the same and*
- e) *There is a final determination as far as the previous decision is concerned.*

6. He then submitted that the Plaintiff's suit met all the above criteria and was therefore *res judicata*. After satisfying himself that the preliminary objection was within the definition set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) E.A 696**, the trial Magistrate arrived at the decision that the Plaintiff's suit was *res judicata* as the judgment and decree dated 2nd May 1986 indicated that the parties in that suit were the same as the ones in the plaintiff's suit and so was the subject matter. In his ruling the trial magistrate indicated that at the time of writing the ruling, the plaintiff's counsel had not yet filed her submissions. This means they were not considered in arriving at the said ruling.

Issues for determination

7. The issues for determination are twofold; The first one is whether the learned trial magistrate's decision to dismiss the suit for being *res judicata* was meritorious. The second one is whether the Appellant suffered any prejudice as a result of his submissions not being considered. I will address these two issues jointly.

Analysis and Determination

8. Counsel for the Respondent submitted that the trial magistrate arrived at a correct decision by holding that the Plaintiff's suit was *res judicata*. He cited the case of **Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others (2017)eKLR** which set out the elements of *res judicata*. He also cited the case of **Timamy Issa Abdalla v Swaleh Salim Imu & others Civil Appeal No. 36 of 2013** for the proposition that an appellate court ought to be cautious in re-evaluating the evidence in the lower court in order to draw conclusions of law.

9. This being a first appeal, it is my duty to re-evaluate the submissions in the lower court and arrive at my own conclusion on the point of law raised in the Preliminary objection.

One of the Appellant's complaints was that submitted her submissions were not taken into account. I have read the said submissions and a pertinent issue that has been raised is that the 1985 case concerned the issue as to who was entitled to inherit the suit property while in the recent suit in the lower court, the plaintiff alleges that the Defendant registered herself as the owner of the suit property fraudulently without a certificate of confirmation of Grant. She has pointed out that what was attached to the Defendant's affidavit in support of the Preliminary objection is a Grant of letters of administration but not a Certificate of Confirmation of Grant. Her argument is that if what the Defendant used to transfer the suit property to her name is the Grant, then the said transfer is invalid.

10. That being the case, it is counsel's submission that the plea of *res judicata* cannot be raised as the facts the Appellant is relying on were not in existence at the time of the former suit. In support of this proposition she has cited the case of **Saifudeen Abdulla Bhai & Hussein Abdula Bhai v Zainabu Mwinyi (2014) eKLR**.

11. I have looked at the documents in the record of Appeal. I note that the Grant of letters of administration was issued on 3rd May 1986. I also note that the Appellant was issued with a title deed on 30th May 1986, clearly, the manner in which she obtained the title could not have been an issue in RMCC no. 27 of 1985. The trial magistrate therefore fell into error by arriving at the conclusion that the suit was *res judicata* merely because the subject matter and the parties were the same. From the foregoing analysis it is clear that the appellant suffered prejudice as a result of her submissions not being considered though I hasten to add that she was to blame for submitting them late.

12. The upshot is that the appeal has merit and it is hereby allowed. The Ruling in Kericho CML&E No. 3 of 2018 is set aside and substituted with an order dismissing the Preliminary objection. The Plaintiff's suit in Kericho CML&E No. 3 of 2018 shall be set down for hearing on the merits. Even though costs normally follow the event, I decline to award the appellant the costs of this appeal as the appeal was largely occasioned by the fact that the appellant did not file her submissions in the lower court on time. Each party shall bear their own costs.

Dated, signed and delivered at Kericho this 29th day of May, 2019.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. J.K.Kirui for Mr. Sang for the Respondent

2. No appearance for the Appellant

3. Court Assistant – Rotich