REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

APPEAL NO. 195 OF 2011

ONYWOKI OKONDO.....APPELLANT

VERSUS

SAMUEL NYARANGO.....RESPONDENT

J U D G M E N T

(Being an appeal from the Ruling and Order of Hon. L. Kaittany (District Magistrate II (Prof) in Kisii CMCC MISC. Application No. 81 of 2011 dated 26th day of August, 2011)

1. The appellant herein moved the lower court vide Miscellaneous Application No. 81 of 2011, filed in the Chief Magistrates Court at Kisii on 20th July, 2011to adopt an award made by Suneka Land Disputes Tribunal in case number 59 of 2008. In those proceedings, it was claimed that the appellant had purchased land parcel **Wanjare/ Bokeire/3737** from the respondent in the year 2003, but the respondent later resold the land. The tribunal held that the respondent had breached the law by reselling the land and directed that the appellant repossess the land.

2. The respondent swore a replying affidavit opposing the application to adopt the Tribunal's decision. He urged the lower court to dismiss it on the grounds that the appellant had made a similar application in Kisii Miscellaneous Civil Application No. 38 of 2009, which had been dismissed for non-attendance. An application by the appellant's counsel at the time to reinstate the earlier application had equally been dismissed with costs.

3. Hon. L. Kaittany DMII agreed with the respondent's contention that Miscellaneous Application No. 81 of 2011 was *res judicata* and by a ruling and order dated 26th August, 2011, dismissed the application. The appellant has now preferred the instant appeal against that decision. The grounds of appeal in the Memorandum of Appeal dated 26th September 2011 and filed in court on the same day are as follows;

> **1) The learned trial magistrate erred in law in finding and holding that the application dated 10th April 2011, seeking to adopt and /or ratify the decision of Suneka Land Disputes Tribunal was barred and/or prohibited vide the provisions of Section 7 of the Civil Procedure Act, Chapter 21 Laws of Kenya;**
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> **2) The learned trial magistrate erred in law in finding and holding that the application before the honorable court was res-judicata, whereas the previous application referred to and forming the basis of the holding of Res-Judicata, had not been determined on merits;**
>
> **3) The learned trial magistrate erred in law in finding and holding that same was not seized with jurisdiction to adopt and/or ratify the decision of the tribunal, contrary to the provisions of Section 7 (2) of the Land Disputes Tribunal Act, No. 18 of 1990;**
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> **4) The learned trial magistrate misconceived, misunderstood and misinterpreted the provisions of Section 7(2) of the Land Disputes Tribunal Act No. 18 of 1990;**
>
> **5) The learned trial magistrate failed to properly evaluate and/or analyze the evidence and submissions rendered by the Appellant's counsel and thereby arrived at an erroneous conclusion, contrary to the obtaining position in law;**
>
> **6) The ruling and/or decision of the learned trial magistrate is invalid, illegal and devoid of legal foundation; and**
>
> **7) The ruling of the learned trial magistrate is contrary to the provisions of Order 21 Rule 4 of the Civil Procedure Rules, 2010.**

4. The parties disposed of the appeal by way of written submissions. Counsel for the appellant filed his written submissions on 25th March 2019 while counsel for the respondent filed his on 26th April, 2019.

5. The appellant submitted that the trial magistrate had misconstrued the doctrine of *res judicata* as Miscellaneous Civil Application No. 38 of 2009 had been dismissed for non-attendance and was not canvassed, deliberated or disposed of on merit. Citing the cases of **John Florence Maritime Services Limited & Another -vs- Cabinet Secretary for Transport & Infrastructure& 3 Others[2015]eKLR** and the case of **Kamunye & Others -vs- Pioneer General Assurance Society Limited (1971)E.A. 263** the appellant argued that the trial magistrate should have interrogated the previous suit to ascertain whether it had been determined on merit.

6. **Section 7** of the **Land Disputes Tribunal Act, 1990** (now repealed) provided for adoption by the Magistrate's court of awards made by the Tribunal as follows;

> **7.(1) The chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the Tribunal.**
>
> **(2) The court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.**

7. The Appellant submitted that in this case, the decision of the Tribunal remained valid and the trial court's finding that it lacked jurisdiction to entertain the application was erroneous. Counsel submitted that Order 12 Rule 6 of the Civil Procedure Rules, 2010 allowed the Appellant to bring a fresh application after it had been dismissed for non-attendance. Therefore the trial Magistrate's contention that hearing the application amounted to sitting on appeal of the decision of a court of coordinate jurisdiction was erroneous and failure by the trial Magistrate to hear it amounted to an abdication of its judicial responsibility.

8. For the Respondent, it was submitted that the earlier suit, Miscellaneous Civil Application No. 38 of 2009 had been dismissed as the Appellant and his counsel were not present when the matter came up for hearing. The Appellant had made an application to set aside the dismissal which was heard and dismissed for lacking merit. Instead of appealing against that decision, the Appellant had replicated the same application by filing Miscellaneous Application No. 81 of 2011 involving the same parties and the same subject matter. The Respondent supported the trial court's decision to dismiss the application for being *res judicata*.

9. The Respondent had averred that he had not attended the purported proceedings before the land disputes tribunal and in any event, the tribunal lacked jurisdiction to determine issues relating to title to land. He relied on the cases of **Republic -vs- Nyandarua District Land Disputes Tribunal & Anor Misc. Civil Application No. 220 of 2001** and **Asman Maloba Wepukhulu & Anor -vs- Francis Wakwabubi Biketi Civil appeal No. 157 of 2001** in support of this. The Respondent also submitted that this appeal had been filed on 14th November 2011, which was 81 days after the order had been made on 26th August 2011 without seeking leave to file the appeal out of time. The record however shows that the appeal was filed on 26th September 2011, therefore this argument cannot stand.

10. Having reanalyzed the evidence as is required of a first appellate court I find that the issues arising for determination from the proceedings and the parties' submissions are twofold. Firstly, is whether the matter before the trial court was *res judicata*, and secondly whether the trial court had the requisite jurisdiction to hear the matter.

11. The doctrine of *res judicata* is established in Section 7 of the Civil Procedure Act as follows;

> **7. 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.**

12. Simply put, the following elements must all be proved in order to bar a suit for being *res judicata*;

a. The suit or issue was directly and substantially in issue in the former suit.

b. That former suit was between the same parties or parties under whom they or any of them claim.

c. Those parties were litigating under the same title.

d. The issue was heard and finally determined in the former suit.

e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

(See **Kenya Commercial Bank Limited -vs- Benjoh Amalgamated Limited Civil Appeal No. 107 of 2010 [2017] eKLR**).

13. A comparison of Miscellaneous Application No. 81 of 2011 with Miscellaneous Civil Application No. 38 of 2009, shows that most of the elements enumerated above have been satisfied. The parties and the orders sought in the both suits were similar. The appellant's contention is that the earlier suit, being Miscellaneous Civil Application No. 38 of 2009 was not heard and determined on merit. The appellant argues that the suit was dismissed for non- attendance and he was therefore entitled to file a fresh suit in line with **Order 12 Rule 6** of the **Civil Procedure Rules** which provides as follows;

6.(1) Subject to subrule (2) and to any law of limitation of actions, where a suit is dismissed under this Order the plaintiff may bring a fresh suit.

(2) When a suit has been dismissed under rule 3 no fresh suit may be brought in respect of the same cause of action.

14. Order 12 Rule 3 which relates to attendance by the defendant only, provides as follows;

3.(1) If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.

(2) If the defendant admits any part of the claim, the court shall give judgment against the defendant upon such admission and shall dismiss the suit so far as it relates to the remainder except for good cause to be recorded by the court.

(3)If the defendant has counterclaimed, he may prove his counterclaim so far as the burden of proof lies on him.

15. Undoubtedly, Order 12 Rule 6 entitles one to file a new suit after its dismissal for non-attendance but only if the defendant failed to attend the hearing. The proceedings and decision of the court in Miscellaneous Civil Application No. 38 of 2009 have not been availed to ascertain whether the respondent was present when the matter came up for hearing. That notwithstanding, the Court of Appeal in the case of **Thomas K. Sambu -vs- Paul K. Chepkwony Civil Appeal No. 234 of 2015[2018]eKLR** held that where one's suit is dismissed for non-attendance, one can only select to make an application to set aside the orders dismissing the suit or file a fresh suit and cannot do both as the appellant sought to do in this case. The Court of Appeal delivered itself thus;

We have considered the decision in the Salem Ahmed Hassan Zaidi case (supra) in the light of the provisions of Order 12 Rule 3 (1) (CPR)…

We adopt the same position in this appeal and hold that the order of dismissal for non-attendance made by C.M. Waithaka, J on the 29th day of May, 2011 amounted to a final Judgment.

The above finding now leads us to determine the appropriate remedy the appellant ought to have taken to redress his default. The answer to this question as correctly put by the trial Judge lies in our construction of order 12 Rule 6(1) & (2) of the CPR. These provide as follows:

…

It is not disputed that the word "may" appears in both sub rules. We have construed the above sub rules and considered them in the light of order 12 Rule 7 CPR as well as the rival submissions on this issue. It is our finding that upon dismissal of Kericho HCCC No. 23 of 2009, under order 12 rule 3(1) of the CPR for non-attendance, the appellant had two options to redress his default. The first was for him to simply file a fresh suit. The second was for him to seek review and setting aside of the order dismissing his suit for non-attendance, under order 12 Rule 7 CPR. It is undisputed that the appellant unsuccessfully availed himself of the order 12 Rule 7 procedures but lost. He initiated an appellate process which he later abandoned.

Order 12 rule 7 provides as follows:

"(7) Where under this order Judgment has been entered or the suit had been dismissed, the Court on application, may set aside or vary the Judgment or order upon such terms as may be just."

In the light of the above provision (order 12 rule 7 CPR), when considered in conjunction with the provisions of order 12 rule 6(1) & 6(2), it is our view that the word "may" in both order 12 Rule 6(1) &(2) CPR (supra), applies where that option is taken as the first option. We find nothing in the said provision that permits a party to use that Order 12 Rule 6 (1)&(2) as a fall back on after losing under the procedure provided for under Order 12 Rule 7 of the CPR.

16. Similarly, in emphasizing its earlier decision in **Njue Ngai -vs- Ephantus Njiru Ngai & Another Civil Appeal No. 29 of 2015 [2016] eKLR** the Court of Appeal in **Co-operative Bank of Kenya Limited -vs- Cosmas Mrombo Moka & Legacy Auctioneering Services Civil Appeal No. 122 of 2018 [2019]eKLR** held;

[17] As stated hereinbefore, this Court has already addressed its mind as to whether a matter dismissed for want of prosecution could be resuscitated through a fresh suit and the categorical answer was that it could not as doing so would offend the doctrine of res judicata. Consequently, this matter being completely on four with the Njue Ngai matter, we find no justifiable reason to allow a party who had litigated on the same issues to re institute a similar suit. In our considered view, the former suit having been dismissed for want of prosecution, the latter suit was res judicata and cannot stand.

17. The binding decisions of the Court of Appeal in the authorities cited above are categorical that a decision to dismiss a suit for non-attendance or for want of prosecution amounts to a final judgment of the court. The Appellant filed Miscellaneous Civil Application No. 38 of 2009at the magistrate's court which was competent by virtue of Section 7 of the repealed Land Disputes Tribunal Act to adopt the award of the Land Disputes Tribunal. The appellant's suit was dismissed for non- attendance. When he elected the option of filing an application to set aside that order, he could not purport to file a fresh application two years later as he did. His only recourse to the decision of the trial court was through an appeal. The decision by the court in Miscellaneous Civil Application No. 38 of 2009 was final and the subsequent suit,

Miscellaneous Application No. 81 of 2011, was *res judicata* as was rightly held by the trial court.

18. Moreover, the questions raised before the Land Disputes Tribunal related to interest in registered land and could not be competently dealt with by the tribunal. Section 3(1) of the Land Disputes Tribunals Act, provided for the tribunal's mandate as follows:-

> **3(1) Subject to this Act, all cases of a civil nature involving a dispute as to-**
>
> **(a) The division of, or the determination of boundaries to land, including land held in common;**
>
> **(b) A claim to occupy or work land; or**
>
> **(c) Trespass to land,**
>
> **Shall be heard and determined by a Tribunal established under Section 4.**

19. The land in question having been registered under the Registered Land Act, the court was the arbiter conferred with jurisdiction to determine the issues raised by the Appellant before the Tribunal. **Section 159** of the **Registered Land Act**, Cap 300 Laws of Kenya (repealed) provided as follows:

> **159. Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court, or, where the dispute comes within the provisions of Section 3(1) of the Land Disputes Tribunals Act in accordance with that Act.**

20. Thus the Suneka Land Disputes Tribunal lacked jurisdiction to deal with the appellant's interest in land parcel **Wanjare/Bokeire/3737** and its decision was void *ab initio* and could not be properly adopted by the Magistrate's Court and even if it had been adopted it would have been liable to be quashed on an appropriate application made in that regard.

21. In the end, I find the appeal to be lacking in merit and dismiss it with costs to the respondent.

JUDGMENT DATED, SIGNED AND DELIVERED AT KISII THIS 19TH DAY OF JULY 2019.

J. M. MUTUNGI

JUDGE