



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CIVIL APPEAL CASE NO. 05 OF 2019

SYLAS NJERU M'RITHAA.....APPELLANT

VERSUS

M'RITHAA THAARA.....RESPONDENT

RULING ON SUMMARY REJECTION OF APPEAL IN CONSONANCE WITH SECTION 79 B OF THE CIVIL PROCEDURE ACT

1. This ruling concerns my decision to summarily reject the intended appeal in terms of Section 79 B of the Civil Procedure Act.
2. The Memorandum of Appeal dated 3rd June, 2019 states as follows:

MEMORANDUM OF APPEAL

1. That the learned Senior Resident Magistrate erred in law and fact in interpreting the principal (sic) of Res judicata as enshrined in section 7 of the Civil Procedure Act Cap 21 Laws of Kenya.
2. That the learned Senior Resident Magistrate specifically erred in law and fact in not differentiating between a Succession case and a pure Civil Case.
3. That the learned Senior Resident Magistrate erred in law and fact by not finding that nowadays Succession courts specifically deals (sic) with property of deceased and anything on top is a different issue to be dealt (sic) in the appropriate avenue (civil case).
4. That the learned Senior Resident Magistrate erred in law and fact by not giving the plaintiffs submission the pinch of salt it deserves (to consider it twice) due to "the tiny line of the plaintiffs suit VIZ-A-VIS (sic) the finalized Succession case.

Reasons whereof the appellant prays for orders:-

- a) That the appeal be allowed and the ruling/order of honourable Senior Resident Magistrate hereto be set aside and this suit be reinstated for hearing by a different magistrate.
 - b) That the costs of this appeal and the lower court case be awarded to the appellant.
3. I have carefully considered the Memorandum of Appeal and the ruling which spawned this intended appeal. I reproduce the said ruling in full herebelow.

RULING ON THE PRELIMINARY OBJECTION

a) BACKGROUND

The defendant objector filed a preliminary objection dated the 14/10/2018 in which he raises objections to the suit as follows;

1. The suit is *res judicata* and offends section 7 of the Civil Procedure Act.
2. The subject matter being Land parcel MWIMBI/S. MUGUMANGO/63 was dealt with in Chuka High Court Civil appeal no 33 of 2015 and judgment dated the 9th June 2016 and ruling on the 13th December 2016.

3. Costs

The Defendant objector in his submissions states as follows; Further to his defence he raised the P.O that the issues raised in this suit are similar to those raised in CHUKA PMCC SUCCESSION CAUSE NO 121 of 2008 where the court directed that the defendant was an equal and direct beneficiary of the estate of the deceased. Pursuant to the judgement an appeal was preferred in High court Civil Appeal no 33 of 2015 formerly Meru HCCA 68 of 2010 which appeal was dismissed for lack of merit. Vide an application to the same court the said application was dismissed. The same exhibits being relied on were produced in the former suits. That being the case the only avenue for the Plaintiff is to appeal the rulings and judgement to a higher court. That the Appeal dealt with the same issue of offending section 7 of the Civil procedure Act. The subject matter is the same and the parties the same. The plaintiff also raised the issue of the suit property in the succession cause and this is a bid to vest the Defendant twice. The property was dealt with in the Chuka HCCA NO 33 of 2015. They relied on the case of MAITHENE MALINDI ENTERPRISES LIMITED V MANIKIN and 2 OTHERS MOMBASA CA NO 68. The issue of equitable distribution was directly and substantially in issue in the former suit. They also relied on the case of KCB V BENJOH AMALGAMATED NRB CA NO 107 OF 2010 (2017) eKLR where the court stated "...res judicata applies not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgement but to every point which properly belongs to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the time..." That the Land parcel NO MWIMBI/MAGUMANGO/63 was canvassed before in the appeal. He also relied on the case of CHRISTOPHER ORINA KENYARIRI V SALAMA BEACH LIMITED (2017) eKLR that the party cannot introduce a new cause of action to seek a remedy that was previously denied. The Defendant prays that the suit be dismissed.

The Plaintiff had been granted 7 days leave to file and serve his submissions from the 16th April 2019 but instead filed his submissions on the 15th May 2019 a whole month later ideally the plaintiff has no audience over the issue without further leave. This court will however grant him the benefit of doubt as not to unseat him from the seat of justice. The court will only deal with real issues as required by law. He submits that the two parcels are not related as one dealt with a deceased for the succession cause and one for the current Defendant (ie S.MUGUMANGO /63. That the current parcel was only mentioned in *obita dicta*. That the issue should be canvassed in full he relied on the constitution article 159 and 501, 2 (k). That the party should be allowed to unleash his frustrations in court. That the suit involved two different parcels, two (sic) different persons one being (sic) living. That succession should only deal with the estate of the deceased and any other be filed in the environment court. The PO required facts be adduced to prove it. That the authorities filed by the Defendant are irrelevant. He prays that the P.O be dismissed.

ANALYSIS

I have considered the affidavits filed by the parties and I have also considered the arguments raised by the parties in this suit as well as the relevant law and authorities applicable.

The main issues for determination are

- i) whether the suit is *res judicata*
- ii) Or whether the plaintiff is entitled to the orders sought.

The Black's law Dictionary defines *res Judicata* as "An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."

In the case of CHRISTOPHER KENYARIRI V SALAMA BEACH (2017) eKLR, The court clearly stated "... the following elements must be satisfied...in conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit
- b) Former suit between same parties or parties under whom they or any of them claim
- c) Those parties are litigating under the same title
- d) The issue was heard and finally determined.
- e) The court was competent to try the subsequent suit in which the suit is raised.

...It is designed as a pragmatic..protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last outcomes favourable to themselves...

...the court requires parties to that litigation to bring forward their whole case, and will not except under special circumstances permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only because they have from negligence, inadvertence or even accident, omitted part of their case...the plea of *res judicata* applies ...not only to points upon which the court was actually required by parties to form an opinion and pronounce judgment but every point which properly belonged to the subject of litigation and which the parties exercising diligence might have brought forward at the time."

In applying the issue before me and in comparison the parties are similar between this case and the CHUKA HCC Appeal number

33 of 2015 the same having emanated at the lower court in PMCC NO 121 of 2008.

The properties in the Lower court case no 121 of 2010 as well as the appeal are similar, inter alia PARCELS NO MWIMBI/MUGUMANGO 193, and MWIMBI/S.MUGUMANGO/139 which then led to the MUGUMANGO /63 was substantially in issue and was allegedly raised at the submission stage which was deemed irregular hence disregarded at both the appeal and the Magistrate court. The issue was canvassed at length in the appeal by even introducing authorities against it and not as *obita dicta*. The Plaintiff in itself under paragraph 14 states that the land belonged to the father and was given to the Plaintiff as a share in trust. The Defence is clear that the Plaintiff is claiming the land through his father the deceased of which he had not raised any claim prior to his death, clearly from a succession claim. The plaintiff seems to be claiming through him. The case was heard and determined an appeal even preferred and dismissed.

I must note that there are substantial similarities in the claim seeking to have the portion in parcel MUGUMANGO/63 granted to the plaintiff.

As was the case in **DR ALI WARIO V DR JOHN NGONDU (2011) eKLR** The court was categorical that “ Section 7 of the Civil Procedure Act forbids the court from entertaining an action in which the matters directly or substantially had been directly and substantially in issue in a former action which had been heard and finally determined by a competent court...”the definition of Res Judicata cannot be over emphasised even when it comes down to applications. Section 7 explanation 5 of the Civil Procedure Act is also clear as it states, “ *any relief claimed in a suit which is not expressly granted by the decree, shall for the purpose of this section be deemed to have been refused*”.

The Magistrate court was competent as was the High Court. Indeed the principle that there must be an end to litigation, and this court cannot sit on appeal of a high court decision just to facilitate that end in defiance of express orders of the High court. Until and except where the high court decision is overturned by a higher court this court shall be bound by it.

Introducing a new suit years later under a different fora touching on the same issues ie a share of the parcel, which ought to have been directly and substantially in issue in a former suit, in bid to obtain orders earlier refused by the court amounts to res judicata. The court has noted that the said praye simply turned to a transfer instead of administration/ subdivision/ distribution. It is clearly a bid to obtain at last outcomes favourable to him after the refusal by the court to grant the orders as sought before and after lengthy periods of delay. The preliminary objection is upheld as having merit.

The upshot of the foregoing is that:

The suit is *res judicata* and the same is dismissed with costs to the Defendant.

Right of appeal.

DATED and SIGNED at CHUKA this 20th May 2019

.....

HON M. Sudi

SRM

Delivered in open court on the 21st May 2019 the presence of:

Advocate for the Plaintiff:

Advocate for the defendant:

HON M. Sudi

SRM

4. I find the ruling delivered by Hon. M. Sudi, SRM Chuka, on 20th May, 2019 well reasoned and a correct and a veritable postulation and exposition of applicable law. I agree that the suit which has spawned this intended appeal is res judicata Chuka H.C.C Appeal No. 33 of 2015. In the circumstances, I decline to escalate this dispute to become an appeal.

5. The intended appeal is hereby rejected in terms of Section 79 B of the Civil Procedure Act.

6. No order as to costs is issued.

Delivered in chambers at Chuka this 15th day of July, 2019 in the presence of:

CA: Ndegwa

P.M. NJORGE

JUDGE