REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ELCA NO 2 OF 2018

ESTHER NYAMBURA KAMAU.....APPELLANT/RESPONDENT

VERSUS

CATHERINE WANGARI THIGA .....RESPONDENT/APPLICANT

RULING

1. The Appellant herein being aggrieved with the ruling and order of the Honourable Senior Resident Magistrate B.N. Kituyi sitting at Murang'a CMCC No. 446 of 2014 delivered on 15/05/2015 preferred the present appeal vide a Memorandum of Appeal dated 8/11/2007 on the following grounds;

a. That the learned Magistrate erred in law and fact in failing to find that the Respondent's application and suit was caught up by doctrine of Res judicata.

b. That the Learned Magistrate erred in law and fact in failing to find that the Respondent has violated section 7 of the Civil Procedure Act Cap 21 Laws of Kenya.

c. That the learned Magistrate erred in law and fact in failing to find that the decision rendered in the former suit C.M.C.C 343 of 2014 finally dealt with the issues raised therein.

d. That the learned Magistrate erred in law and fact in failing to uphold the Appellants Preliminary Objection.

e. That the learned Magistrate erred in law and in fact in failing to analyze the facts and apply the law on the Res judicata.

f. That the learned Magistrate erred in law and in fact in making a lopsided Ruling in favour of the Respondent contrary to the facts and evidence presents before her.

g. That the learned Magistrate erred in law and fact in giving undue weight to the submissions of the Respondent thereby arriving at a biased finding.

h. That the learned Magistrate erred in law and fact in considering extraneous matters which were not in issue.

i. That the learned Magistrate erred in law and fact in ruling the way she did.

2. The Appellant thus implored the Court to find in her favour for the following orders;

a. This Appeal be allowed.

b. The Chief Magistrates Court's at Murang'a decision made on the 15/5/2015 be set aside and orders thereof be vacated.

c. The costs of this appeal and of the proceedings in the Chief Magistrate's Court at Murang'a on the Preliminary Objection dated 19/12/2014 and filed on 19/12/2014 be awarded to the Appellant.

3. The impugned ruling was in respect to the Preliminary Objection dated 19/12/2014 by the Defendant for the following prayers;

a. That the Applicants Application and the suit is Resjudica as it offends the mandatory provisions of section 7 of the Civil Procedure Act, cap 21 Laws of Kenya.

b. That the Applicants Application is scandalous, frivolous, bad in law, vexatious and an abuse of the Court process.

c. That the application and suit are otherwise incompetent and ought to be struck out with costs.

4. The Defendant contended that the Plaintiff had previously instituted suit number **PMCC 343 OF 2014** against the same Defendant in the instant suit addressing the same issues to which a decision was rendered on 14/11/2014 striking out the suit which the Defendant believes was a final determination of the issues therein. The applicant opined that the Respondent ought to have sought a review or an appeal to the previously instituted suit. The Respondent contended that the previously instituted suit was struck out on a technicality with no determination on the substantive issues, for that reason the Respondent was convinced the suit was not res judicata.

5. The trial Magistrate agreed with the Counsel for the Respondent and noted that she was actually the one who had dealt with the previously instituted case and that she had indeed struck it out for want of form without delving into determination of the substantive issues therein. That the previous suit was not determined on merits therefore there was no final determination of the issues as required under section 7 of the Civil Procedure Act. In the premises the Preliminary Objection was declined precipitating the instant appeal.

6. Counsels for the parties consented to dispose of the appeal through written submissions.

7. The Respondent in her submissions faulted the applicant for failing to bring the proceedings and ruling in case no. 343 of 2014 which they heavily rely on in this appeal before this Court. That the Appellant was duty bound to produce those proceedings. That the suit no 343 of 2014 was struck out for want of form and not on merits. The competency of this instant appeal was challenged for want of leave by dint of Order 43 Sub Rule 2 Rule 1, that an appeal from a Preliminary Objection does not lie as of right. That Jurisdiction does not amount to competency.

8. The Appellants submitted that he had fully established the four fold requirements for a claim in a suit being res judicata as set out in statute and case law. That any determination rendered by a competent Court would suffice to declare a subsequent suit over the same subject matter res judicata. On the issue of the appeal not being properly before this Court they implored the Court to invoke the provisions of Article 159 in their favour.

9. In the record of appeal there is the pleadings for the two cases in which I note the parties in both suits are indeed the same the cause of action was in respect to dissolution of an alleged trust over parcel of land number LOC.10/KAHUTI/4056 in favour of the Plaintiff and Respondent in this appeal. I however note that there are no proceedings in respect to case no 343 of 2014 neither is there a copy of the ruling in that case that supposedly struck out the case. This omission was not addressed in the submissions to the appeal either by the Appellant despite being raised by the Respondent. In absence of the said ruling, it will be difficult for this Court to confirm if indeed, there was a final determination of the matters in issue in the previous suit or not, which is the bone of contention in the present appeal.

10. The principal of *re judicata* is found in Section 7 of the Civil Procedure Act which provides 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, 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."**

11. The doctrine of *res judicata* as stated in the said Section has been explained in a plethora of decided cases. I only need to cite one of those cases. In the recent case of **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR),** the Court of Appeal held that:

> **"Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disinjunctive but conjunctive terms;**
>
> **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."**

12. The Court explained the role of the doctrine thus:

> **"The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent Court. It is designed as a pragmatic and commonsensical 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. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of *res judicata* thus rest in the public**

interest for swift, sure and certain justice."

13. My understanding of the *res judicata* principle is that it is meant to lock out from the Court system a party who has had his day in a Court of competent jurisdiction from re-litigating the same issues against the same opponent. Surely it would be a waste of the Courts' valuable time if there was no tool for arresting such mischief. That was the tool the Appellant here sought to deployed through the Preliminary Objection and now the gist of the instant appeal. The question therefore is whether the Appellant did satisfy the conditions for the application of the principle of *res judicata* in view of the facts of this case.

14. In respect to the orders sought this being the decision may be guided by the foregoing case law; On the duty of the first appellate Court, Hancox JA (as he then was), stated in **Ephantus Mwangi & another -v- Duncan Mwangi Wambugu [1982-88] 1KAR 278 at page 292,** as follows:

> **"A Court of Appeal will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the finding he did."**

15. Madan JA (as he then was) in **United India Insurance Co. Ltd Versus East African Underwriters (Kenya) Ltd [1985] EA 898** wherein he stated thus:-

> *"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 as at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal 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 consideration of which he should have taken account of; or fifthly, that his decision albeit a discretionary one is plainly wrong."*

16. The trial Court did note that it's the same Court that had actually handled the previously instituted suit and made its ruling in the Case no. 353 of 2014, that she had perused the file and concurred that the dismissal was on a technically for want of form and no determination for the matters in issue was done in the previous suit. There being no evidence placed before me in the contrary, a ruling made in such circumstances does not fall within the meaning of section 7 of the act, the case was not determined on merit thus the subsequent suit the subject matter of this appeal was thus not res judicata.

17. The appeal has no merit. It is dismissed with costs to the Respondent.

18. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 17TH DAY OF OCTOBER 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Ndegwa for the Appellant

Mwaniki for the Respondent

Irene and Kuiyaki, Court Assistants