Hinga v Gathara & 5 others (Civil Appeal 374 of 2018)
[2024] KECA 974 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 974 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 374 OF 2018

K M'INOTI, KI LAIBUTA & PM GACHOKA, JJA

JULY 26, 2024

BETWEEN

ANNE MUMBI HINGA ..... APPELLANT

AND

VICTORIA NJOKI GATHARA ..... 1ST RESPONDENT

ZIPPORAH WATETU KAMAU ..... 2ND RESPONDENT

JOSEPH MWOKI KAKENYI ..... 3RD RESPONDENT

FAITH MUTHEU KASYOKI ..... 4TH RESPONDENT

CHIEF LAND REGISTRAR ..... 5TH RESPONDENT

DIRECTOR OF SURVEY ..... 6TH RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Okong'o, J.) dated 15th September 2017 in E.L.C.C. No. 1140 of 2013)

JUDGMENT

1. This appeal has a long and convoluted history. However, for purposes of this judgment, it is not necessary to recite the entire labyrinthine history. Suffice it to state that on 19th October 1999, the 1st respondent, Victoria Njoki Gathara, obtained a judgment against the appellant, Anne Mumbi Hinga, from an arbitral tribunal. The tribunal found the appellant in breach of an agreement for sale of the parcel of land known as LR No 18084 (original 3994/11/7) (the suit property) and made an order for specific performance. On 7th January 2002, the High Court adopted the arbitral award as an order of the court and directed the Registrar to execute the relevant documents to transfer the suit property to the 1st respondent.

2. Thereafter, the appellant initiated a raft of suits, applications, appeals and petitions, all the way to this Court. This Court finally upheld the arbitral award.

3. In the meantime, the appellant, who had applied to amalgamate the various subdivisions of LR No 3994/11/7, applied in the High Court for an injunction to restrain the 1st respondent from taking possession of the suit property. The appellant's contention was that, after amalgamation, the suit property ceased to exist, and that the order for specific performance was incapable of enforcement because it did not specify the actual parcel of land to be transferred to the 1st respondent. That application was dismissed on 7th May 2000 and the appellant ordered to give the 1st respondent vacant possession within 10 days.

4. Subsequently, the subdivisions of LR No 3994/11/7 by the appellant were cancelled in compliance with the court order and the suit property transferred and registered in the name of the 1st respondent. Ultimately, the 1st respondent subdivided the suit property and sold and transferred the subdivisions thereof to the 2nd, 3rd and 4th respondents.

5. On 24th September 2013, the appellant filed Civil Suit No 1140 of 2013 in the Environment and Land Court (ELC) at Nairobi claiming that the 5threspondent (Chief Land Registrar)and the6th respondent (Director of Survey) had illegally and unlawfully cancelled the subdivisions of LR No 18084. The appellant also contended that the decree of the High Court which ordered her to transfer the suit property to the 1st respondent was incapable of enforcement.

6. Accordingly, she prayed for a raft of reliefs, among them a declaration that the order to transfer the suit property to the 1st respondent did not authorise cancellation of the subdivisions; a declaration that the cancellation of the subdivisions was null and void; an order for restoration of the subdivisions; a declaration that the subdivision of the suit property by the 1st respondent and transfer of the subdivisions to the 2nd, 3rd and 4th respondents was null and void; an order for restoration of the suit property to its former status; a mandatory injunction to remove the 1st, 2nd, 3rd and 4th respondents from the suit property; an injunction to restrain the said respondents from entering or remaining on the suit property; general damages, costs and interest.

7. The suit came under immediate challenge by the respondents. On 2nd July 2015 , the 1st respondent applied for the appellant to be declared a vexatious litigant, and for dismissal of the suit. On her part, on 29th July 2015, the 2ndrespondent, Zipporah Watetu Kamau raised a preliminary objection against the suit on the basis that it was vexatious, *res judicata* and an abuse of the process of the court. Lastly, on 25th August 2015, the 3rdrespondent (Joseph Mwoki Kakenyi) and the 4th respondent (Faith Mutheu Kasyoki), applied to strike out the suit for failure to disclose a reasonable cause of action, and for being scandalous, frivolous, vexatious, and *res judicata*.

8. The two applications and the preliminary objection were heard by Okong'o, J. who, by a ruling dated 15th September 2015, found that the suit was frivolous, vexatious and an abuse of the process of the court. The learned judge also found that the suit was *res judicata*. The appellant was aggrieved and preferred the present appeal based on five grounds of appeal, which her counsel condensed into two, namely that the trial court erred in finding that the suit was *res judicata* and that it did not disclose a reasonable cause of action.

9. On the first ground, the appellant relied on written submissions dated 2ndnd November 2019, and submitted that the parties in the suit that gave rise to this appeal were different from those in the earlier suits, and that the causes of action and the reliefs sought were different. It was also contended that the issues raised in the latter suit had not been raised in the former suits.

10. The appellant relied on the decision in *Benjoh Amalgamated Ltd. & another v Kenya Commercial Bank Ltd.* [2014] eKLR regarding the elements of *res judicata*, which she submitted must all be established. It was the appellant's contention that the respondents had not established the elements of *res judicata*, and that the ELC erred by finding that her suit was *res judicata*.

11. On the second ground, the appellant relied on *D. T. Dobie & Co. (K) Ltd. v Joseph Maria Muchina & another* [1980] eKLR and submitted that no suit should be summarily dismissed unless in plain and obvious cases where the suit was hopelessly beyond redemption. The appellant argues that this was not such a case because she was, among other things, challenging the cancellation of the subdivisions, illegal demolition of her fence and enforceability of the High Court decree, which issues had not been raised in the previous suits.

12. The 1st respondent opposed the appeal vide written submissions dated 25th September 2020. It was contended that the ELC correctly found that the appellant's suit was *res judicata* because the issues raised therein had already been adjudicated by a court of competent jurisdiction, which conclusively determined the rights of the parties as regards the suit property. In support of the submission, the 1st respondent relied on section 7 of the *Civil Procedure Act*; *DSV Silo v The Owners of Sennah* [1985] 2 All ER 104; and *Bernard Mugo Ndegwa v James Nderitu Gitahe & 2 others*[2010]eKLR.

13. Relying on *Pop In Kenya Ltd & 3 others v Habib Bank Ag Zurich* [1990] eKLR, the 1st respondent added that, save in exceptional circumstances, parties to litigation are obliged to present their entire cases rather than submit the same in instalments, and that the doctrine of *res judicata* applies not only to the points that the court was asked to determine, but also to every point which, by reasonable diligence, properly ought to have been raised in the litigation.

14. On the second ground, the 1st respondent submitted that there was no new cause of action disclosed in the latter suit, and that the same was a plain abuse of the process of the court. The decision of *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd. & 2 others*[2009] eKLR was relied on in support of the proposition that initiating a multiplicity of actions over the same subject matter constitutes an abuse of the process of the court.

15. The 2nd, 3rd and 4th respondents also opposed the appeal and associated themselves with the submissions made by the 1st respondent. However, the 5th and 6th respondents neither appeared for the virtual hearing of the appeal nor filed written submissions, even though they were duly served with the hearing notice.

16. We have carefully considered this appeal. In our view, the appeal turns on the issue as to whether the latter suit, ELCC No 1140 of 2013, was *res judicata* and an abuse of the process of the court. The record clearly shows the litigation that had taken place between the appellant and the 1st respondent prior to the institution of the said suit. First, there was the arbitral proceedings where the arbitral tribunal found the appellant in breach of an agreement for sale and issued an order for specific performance. The arbitral award was adopted as an order of the High Court on 7th January 2002. By an application dated 25th April 2002, the appellant unsuccessfully applied in the High Court to set aside the arbitral award and subsequently proceeded to this Court on appeal.

17. By a judgment dated 13th November 2009, this Court held that the High Court had no jurisdiction under the *Arbitration Act* to set aside the arbitral award on the grounds relied upon by the appellant

and, in any event, an arbitral award could not be set aside after three months from the date of the award. The Court expressed itself as follows:

> " As we have stated above, the Court had no jurisdiction to do so in the first place under the clear provisions of the Act. Intervention by the filing of several interlocutory applications which has in turn resulted in considerable delay should have been treated as jurisdictional issue under the Act and dealt with straightaway. On our part we recognise that the matters raised in the application before the superior court and this appeal are well outside the provisions of section 39 of the *Arbitration Act* and for this reason, we have no hesitation in striking out the appeal and also hereby set aside the superior court ruling and in substitution strike out the application dated 25th April 2008 with costs to the respondent both here and below. It is so ordered."

18. While litigation was going on in this Court, the appellant refused to transfer the suit properly to the 1st respondent, who then applied in the High Court for an order to compel the appellant to execute the documents of transfer or, in default, the same be executed by the Deputy Registrar. The High Court granted the order vide a ruling dated 23rd June 2005, and the suit property was duly transferred and registered in the name of the 1st respondent. The appellant still refused to part with possession of the suit property.

19. Clearly, to forestall enforcement of the arbitral award which already had judicial recognition, including by this Court, on th March 2010 the appellant filed an application to stop the 1st respondent from taking possession of the suit property on the grounds that the suit property was not identified on the ground, and that there was need for the court to conduct an inquiry to determine the actual position of the suit property.

20. That application was heard and dismissed by the High Court (Kimaru, J., as he then was), on 7th May 2010. The learned judge summarised the gist of the appellant's application as follows:

> " It was the respondent's case that the position of the parcel of land that has been decreed in favour of the applicant had not been identified or determined on the ground hence her plea for the court to conduct an inquiry with a view to ascertaining the actual position on the ground on the suit parcel of land."

21. The learned judge resolved the issue as follows:

> " This court did not to subscribe the argument put forward by the respondent that neither the arbitrator, this court, nor the Court of Appeal appreciated the fact that the parcel of land that was subject of the dispute between the applicant the and the respondent did not exist on the ground. The agreement that the applicant entered with the respondent was in respect of a specific parcel of land known as LR No 18084. That parcel of land measures one (1) acre. There is a deed plan connoting its specific existence and position on the ground. The arbitrator made an award in favour of the applicant in respect of a specific parcel of land which was identified by its land reference number. This court and the Court of Appeal referred to the dispute between the applicant and the respondent in regard to a specific parcel of land. The decree that was issued by this court when the award of the arbitrator was adopted was in respect to a specific parcel of land identifiable by a land reference number and a Deed Plan. The court did not issue a preliminary decree. It issued a final decree. The court further issued orders directing the Deputy Registrar of this court to execute a conveyance

transferring a specific parcel of land to the applicant. This court, in issuing the decree in favour of the applicant, was not dealing with an unidentified parcel of land on the ground.

22. The doctrine of *res judicata* is founded on sound public policy considerations, firstly, that litigation on an issue has to come to an end and secondly, that a party should not be vexed by having to defend the same action over and over again. (See *William Koross v Hezekiah Kiptoo Komen & 4 others*, CA. No 223 of 2013; and *John Florence Maritime Service Ltd & another v Cabinet Secretary for Transport & Infrastructure & 3 others* (*supra*). For that reason, section 7 of the *Civil Procedure Act* prohibits courts, in absolute terms, from trying suits or issues between the same parties or their representatives, if the suit or issue has previously been finally determined by a court of competent jurisdiction.

23. In *Uhuru Highway Development Ltd v Central Bank of Kenya & others*, CA No 36 of 1996, the prerequisites of a plea of *res judicata* were stated by this Court thus:

> " In order to rely on the defence of *res judicata* there must be:
>
> i. a previous suit in which the matter was in issue;
>
> ii. the parties were the same or litigating under the same title.
>
> iii. a competent court heard the matter in issue; and
>
> iv. the issue has been raised once again in a fresh suit."
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> (See also *Kenya Commercial Bank Ltd. v Benjoh Amalgamated Ltd.* (supra)).

24. We are satisfied that in its totality, the latter suit is nothing more than a challenge, by craft, of the transfer of the suit property to the 1st respondent, an issue which was determined by Kimaru, J (as he then was). For example, in paragraphs 23 to 26 of the plaint, the appellant pleaded as follows:

> " 23. The plaintiff avers that the order/decree of this court in Misc. Civil Case No 617/2000 is incapable of enforcement and the 6th defendant's action in cancelling the deed plans and survey plans aforesaid was not in compliance with the said court order.
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> 24. The plaintiff avers that the 5th and 6th defendants should be compelled to restate the deed plans and survey maps for the suit property purportedly cancelled pursuant to the court order/decree of the court in Misc. Civil Case No 617/2000
>
> 25. The plaintiff avers that the continued possession by the 1st defendant of a portion of the suit property purportedly pursuant to an order/decree of the court in Misc. Civil Case No 617/2000 which order/decree is incapable of enforcement amounts to trespass and the 1st defendant ought to be compelled by way of mandatory injunction to move out of that portion of the suit property.
>
> 26. The 1st defendant's action of subdividing the suit property and subsequently transferring the same to the 2nd, 3rd and 4th defendants is a nullity and the court ought to so declare and cancel the conveyances to the 1st, 2nd, 3rd and 4th defendants."

25. In view of the determination by Kimaru, J. (as he then was), we are satisfied that the ELC correctly concluded that the issues raised by the appellant about the identity of the suit property, its physical

location and continued existence had already been conclusively determined by a court of competent jurisdiction and could not be revived in a subsequent action.

26. The appellant wrongly assumes that by adding additional respondents, that in and by itself would save her suit from the doctrine of *res judicata*. We do not agree with her view. The alleged new cause of action against these respondents does not exist independent of the appellant's claim of the identity or non- existence of the suit property. In fact, the appellant's claim about the non-existence of the suit property, which has already been determined by the High Court, is the foundation of the illegalities she alleges against the additional respondents.

27. The judgment of this Court, then the final court in the land, recognised the arbitral award, and all the efforts that the appellant has made since were intended to undo that decision. No court can validly aid her in that undertaking, particularly not the High Court and courts of equal status. It is apt to point out that, in furtherance of that venture, the appellant filed High Court Petition No 202 of 2015 seeking, among others, declarations that the rulings of the High Court dated 17th January 2002 and 24th September 2008, and the judgment of this Court dated 13th November 2009 were unconstitutional, null and void. That petition was struck off on 3rd February 2017.

28. We are equally satisfied that, other than being *res judicata*, the appellant's latter suit was an abuse of the process of the court. In*Muchanga Investments Ltd. v Safari Unlimited (Africa) Ltd & 2 others* (*supra*), this Court observed that it is not possible to comprehensively list all possible forms of abuse of the process of the court or formulate any hard or fast rules for determining whether any given facts constitute abuse of the process of the court. Whether or not there is abuse of the process of the court depends on the peculiar circumstances of each case. But the ultimate concern of the court is to stop a party from using the process of the court to achieve an ulterior purpose that is antithetical to the protection of the interests of justice.

29. Examples of abuse of the process of the court identified by this Court include:

    a. Knowingly and dishonestly misleading the court;

    b. Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action;

    c. instituting different actions between the same parties simultaneously in different courts even though on different grounds;

    d. pursuing two similar processes to vindicate the same claim or to obtain the same remedy; and

    e. Proffering a claim unsupported by law or one premised on recklessness or frivolity.

30. An examination of the history of this litigation and the suits, applications, petitions and appeals filed by the appellant leave no doubt in our minds that the appellant's primary motive has been to thwart, and not to protect the cause of justice.

31. For the foregoing reasons, we find no merit in this appeal and hereby dismiss the same with costs to the respondents. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY, 2024.

K. M'INOTI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA, C.Arb, FCIArb

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JUDGE OF APPEAL

M. GACHOKA, C.Arb, FCIArb.

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.