Anzigale v Kolongei Farmers Cooperative Society (Civil Appeal 98 of 2018) [2023] KECA 413 (KLR) (14 April 2023) (Judgment)

Neutral citation: [2023] KECA 413 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPEAL 98 OF 2018

F SICHALE, FA OCHIENG & LA ACHODE, JJA

APRIL 14, 2023

BETWEEN

JACOB AGENGO ANZIGALE ALIAS MANASE ..... APPELLANT

AND

KOLONGEI FARMERS COOPERATIVE SOCIETY ..... RESPONDENT

(Appeal against the Ruling of the High Court at Kitale (Mwangi Njoroge. J) dated 28th May, 2018 In ELC Case No. 190 of 2017)

JUDGMENT

1. This is the first appeal of Jacob Agengo Anzigale alias Manase (the appellant) against the ruling of Njoroge J in Environment and Land Court Case No 190 of 2017. Kolongei Farmers' Cooperative Society is the respondent.

2. A brief background of this matter is that the respondent filed a notice of motion in the ELC for a substantive order:

> " that there be a stay of execution of the eviction order given on the June 8, 2009 in the HCCC No 107 of 1997 pending the hearing and the determination of this suit"

3. The said application was based on the grounds that the respondent and the appellant entered in to a sale agreement for the sale of LR No 5335/31 (suit land) on October 17, 2011, the respondent paid the consideration and took possession of the suit land.

4. Prior to that, the appellant and others had sued the respondent in respect of an agreement relating to LR No 5335/10, and obtained declaratory orders against the respondent. Aggrieved by the said orders, the respondent appealed in this Court where, vide the parties' consent, it was ordered that the respondent do recover the purchase price from the appellant or take appropriate steps to regularize the transaction entered into vide the earlier agreement.

5. It was averred that the appellant had failed to refund the purchase price or take steps to regularize the sale of the suit land to the respondent.

6. Further, the appellant had sought to effect the eviction order yet the respondent has many members in occupation of the suit land and they have been in such occupation for over twenty years and have expended substantial amounts of resources on the land. As such, they will suffer irreparable loss and damage in the event that they are evicted. It was also averred that the eviction order issued was irregular and unlawful as the respondent was not invited to show cause.

7. In opposition, the appellant filed a replying affidavit and notice of Preliminary Objection. It was averred that the matter herein had been substantially in issue in Kitale High Court Suit No104 of 1997 and in Eldoret Civil Appeal No 242 of 2004 hence the suit is res judicata; that the sale agreement is null and void for want of the consent of the Land Control Board; that the superior court in entertaining the suit does so per incuriam in breach of the Court of Appeal decision in Eldoret Civil Appeal No 242 of 2004; that the respondent has always been in unlawful possession of the land; that the respondent has not paid the full purchase price and that the appellant wrote twice to revoke the agreement.

8. Upon considering the matter before him, the learned Judge found that it is proper to consider and determine the application on the balance of convenience for the purpose of safeguarding the suit land. As such, he allowed the application, pending the hearing and determination of the main suit.

9. The appellant dissatisfied and aggrieved by the above ruling filed this appeal on the following grounds that:

   (a) The learned Judge erred in law in failing to appreciate that the validity of the sale agreement subject of the suit, the one dated October 17, 2011 was a question of law, and not facts to be canvassed in the hearing of the main suit.

   b. The learned Judge erred in law in failing to appreciate that the sale agreement subject of the suit, the one dated October 17, 2011 was null and void by operation of law.

   c. The learned Judge erred in law in failing to address himself on the prayer No 2 in the appellants Notice of Preliminary Objection dated December 30, 2017.

   d. The learned Judge erred in law in failing to appreciate and follow the binding decision of this Honourable Court in Nairobi Court of Appeal Civil Appeal No 76 of 2014".

10. This matter was canvased by way of written submissions and oral high lights. Learned Counsel, Mr. Githinji filed written submissions on behalf of the appellant. There was neither appearance for the respondent, nor written submissions filed by them or on their behalf inspite of service of a hearing notice upon them on November 1, 2022.

11. Mr. Githinji urged this Court to find that the agreement dated November 17, 2011 is null and void for want of Land Control Board consent and that this is a pure question of law. That it was a common ground that the sale agreement dated October 17, 2011 did not have consent of the Land Control Board, either within the 6-month statutory period or as at the time of filing this application. It was further stated that the appellant argued before the superior court to vindicate 'a generally accepted practice' that the appellant ought to have obtained the consent. That under section 8 (1) of the *Land Control Act* the procurement of the Consent is the responsibility of any of the parties.

12. He also argued that the authority of *Macharia Mwangi & 87 others v Davidson Kagiri* (2014) eKLR relied on by the respondent to plead an equitable estoppel as against the appellant, and to plead a constructive trust in favour of the respondent is bad law. His reasons were that a creation or the

declaration of a trust of agricultural land situated within a controlled area is also void for all purposes, unless the said consent has been obtained as provided by section 6 of the *Land Control Act*, and the said *Macharia Mwangi & 87 Others* (Supra) decision was quickly departed from by this Court in Civil Appeal No 76 of 2014; *David Sironga Ole Tukai v. Francis Arap Muge & 2 Others*.

13. We have looked at the record of appeal and the submissions on record. As stated earlier, this is a first appeal, and our role as such was elucidated in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, where this Court stated that:

> " [A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect"

14. Having stated that, the single issue to be considered in the matter before this Court, is whether the Preliminary Objection raised by the appellant in the superior court met the threshold for it to be upheld. For us to answer this question we shall consider two sub- issues. The first as stated in ground No 2 is whether the suit is res judicata and the second as summarized from grounds No 1, 3 and 4 is whether the sale agreement, which is the subject of the suit, the one dated October 17, 2011 was null and void by operation of law

15. For a Preliminary Objection to succeed it is trite law that it must be based on a pure point of law and such a pure point of law must be one such as is capable of disposing of the suit. This Court in the celebrated case of *Mukisa Biscuit Manufacturing Co Ltd vWest End Distributors Ltd* [1969) EA 696, pronounced itself on what defines a Preliminary Objection as follows:

> " . A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

16. Further, the Preliminary Objection will not succeed if it is predicated on facts that must be ascertained by adduction of evidence, or it is dependent on the discretion of the court. This is to be discerned in the same case of Mukisa Biscuits Manufacturing Company (supra) at page 701, where the Court went further to state that:

> " A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion "

We have therefore considered the record before us to establish whether the appellant has made his case on the two sub issues.

17. In ground No2 of this appeal the appellant argues that the learned Judge did not address himself to prayer No 2 in the appellant's Notice of Preliminary Objection dated December 30, 2017. The said prayer was couched as follows:

> " This honourable court has no jurisdiction to hear and determine this application or indeed the entire suit, matter is res judicata, as
>
> ...
>
> b. the matters directly and substantially in issue herein have been directly and substantially in issue in Eldoret Civil Appeal No 242 of 2004, being an Appeal by the plaintiffs herein from the aforementioned Kitale High Court Suit No 104 of 1997 and the same was heard and the Appeal dismissed in its entirety on February 16, 2017"

18. The first question that begs an answer therefore, is whether this case was *res judicata*. The *Black's Law Dictionary,* Thomson Reuters, 10th Edition defines res judicata as in the following way:

> " A thing adjudicated
>
> 1. An issue that has been definitively settled by judicial decision.
>
> 2. An affirmative defence barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been - but was not -raised in the first suit.
>
> The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, (3) the involvement of the same parties, or parties in privity with the original parties"

19. The purpose of the principle of res judicata is to support the good administration of justice in the interests of the public and the parties by preventing abuse and duplicative litigation and its twin principles are often expressed as being the public interest that the courts should not be clogged by re-determinations of the same disputes; and the private interest that it is unjust for a man to be vexed twice with litigation on the same subject matter.

20. The substantive law on *res judicata* is found in Section 7 of the *Civil Procedure Act* Cap 21 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"

21. Further, the Supreme Court in *Independent Electoral & Boundaries Commission vMaina Kiai & 5 Others* [2017] eKLR, while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

(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."

22. This Court in *John Florence Maritime Services Limited & Another vCabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR pronounced itself as follows:

> "The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unravelling uncontrollably."

23. The appeal before this Court revolves around the validity of the agreement dated October 17, 2011 between the parties herein. We note that in paragraphs 14,15,16, 17 and 18 of the judgment, the superior court pronounced itself on the prayer set out above.

24. In paragraph 18 and 19 of the impugned ruling the learned Judge held that:

> 18. the agreement relied on in these proceedings was entered into after the suit had been determined and before the appeal was lodged.
>
> 19. I do not think that the agreement was the subject matter of either the suit or the appeal, it being a new agreement, and in any event, the defendant has not demonstrated that it was. This court may examine the validity of the said agreement vide a substantive hearing of the suit herein."

From the foregoing analysis, we find that the agreement relied on in these proceedings having been entered into after Kitale High Court Suit No 104 of 1997 had been determined it was therefore not part of the determination before the High Court. The agreement in issue was also not the subject matter before the court in the Civil Appeal No 242 of 2004. And for that reason we agree with the ELC Judge that the matter was not res judicata.

25. In grounds No1, 3 and 4 of the appellant's appeal, Mr. Githinji urged this court to find that the agreement dated October 17, 2011 is null and void for want of Land Control Board Consent. He submitted that this is a pure question of law. It was not disputed that the respondent did not obtain the Land Control Board Consent and in Mr. Githinji's view, this rendered the agreement void in regard to section 6 of the *Land Control Act*. The said section provides as follows:

> (1) Each of the following transactions that is to say—
>
> a. the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;
>
> b. the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots

in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;

c. the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act."

26. Section 7 of the said *Act* provides that, consideration paid for a transaction which becomes void is recoverable as a debt subject to section 22 of the *Act*. An application for consent is made under section 8 (1) of the said *Act*, which requires that the application for consent should be made in the prescribed form, within six months of the making of the agreement. The proviso thereto gives the High Court power to extend the period if it considers that there are sufficient reasons to do so upon such conditions, if any, as it may think fit.

27. This Court has on several occasions been called upon to examine this contentious topic, whether failure to obtain the Land Control Board consent makes the agreement between the parties void. In *David Ole Tukai v Francis Arap Muge & 2 Others* [2014] eKLR relied on by the appellant, this Court held thus:

> " For several reasons, we are, with respect, unable to agree with the above reasoning. First and foremost, we have already stated that in our opinion, granted the express, unequivocal and comprehensive provisions of the *Land Control Act*, there is no room for the courts to import doctrines of equity into the Act. This is the simple message of section 3 of the *Judicature Act*. Consequently, invocation of equitable doctrines of constructive trust and estoppel to override the provisions of the *Land Control Act* has, in our view, no legal foundation. We have also noted that this Court had previously held in a line of consistent decisions and in very clear terms, that there was no room for application of the doctrines of equity in the *Land Control Act*. Those previous judgments were not referred to in the judgment in Macharia Mwangi Maina & 87 Others V Davidson Mwangi Kagiri (supra).

The Court allowed the appeal and overturned the decision of the High Court which had held that in the situation before the court, the solution was to apply the principles of equity, and natural justice to temper the harshness of law such as Section 6 of the *Land Control Act*.

28. In *William Kipsoi Sigei v Kipkoech Arusei & another* [2019] eKLR this Court departed from the earlier rigid stance and in upholding the decision of the trial court stated thus:

> " We come to the conclusion that in the circumstances of this case the equitable doctrines of constructive trust and proprietary estoppel were applicable and enforceable in regard to land subject to the *Land Control Act*. We therefore agree with the learned judge of the Environment and Land Court that despite the lack of consent of the Land Control Board, the doctrine of constructive trust applied to the agreement between the appellant and the 1st respondent".

29. In regard to the Land Control Board consent, the Supreme Court in *Rose Jebor Kipngok v Kiplagat Kotut* [2020] eKLR stated thus:

> 12. Aggrieved by the decision of the trial court, the Respondent lodged an appeal in the Court of Appeal. After hearing the parties, the Court of Appeal on the contestation relating to the validity of the consent of the Land Control Board, agreed with the trial court that pursuant to section 8 of the *Land Control Act*, an application for consent of the Land Control Board is

made within six months of entering into a contract for sale of controlled land, provided that for sufficient reason, the High Court may extend the period. However, it found that it was indisputable that a sale agreement was entered into between the Applicant and the Respondent and that pursuant to the agreement, the Applicant received a deposit of Kshs 700,000. It opined that the *Land Control Act* was not intended to be an instrument for unjust enrichment and that the equity doctrines of constructive trust and proprietary estoppel are applicable to the appeal. The Appellate Court proceeded to fault the trial court for failing to consider and apply the two equity doctrines and added that nothing in the *Land Control Act* prevents the Respondent from relying on the doctrines of equity. Consequently, it allowed the appeal and issued orders for specific performance against the Applicant.

Flowing from the summary above, we see no reason to allow a second appeal to this Court as the determination by the Appellate Court in our view, does not transcend the circumstances of this particular case. By the same token, we do not see any significant question of law that requires the further input of this Court."

30. It is clear from the jurisprudence in decisions above that the Land Control Board consent is not a question of pure point of law and the Court considers the circumstances of each case. As stated in the decision of the court appealed from, the validity of the impugned agreement was to be examined vide a substantive hearing of the suit.

31. Consequently, we are of the view that the appellant's Preliminary Objection before the superior court did not meet the threshold required of such an application. Ultimately, we dismiss this appeal with costs and uphold the ruling of the High Court.

Dated and delivered in Eldoret this 14th day of April, 2023

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR