Tongelech v Chamir & 2 others (Civil Appeal 133 of 2019)
[2023] KECA 733 (KLR) (16 June 2023) (Judgment)

Neutral citation: [2023] KECA 733 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPEAL 133 OF 2019

F SICHALE, FA OCHIENG & LA ACHODE, JJA

JUNE 16, 2023

BETWEEN

CHEPOTULA TONGELECH ..... APPELLANT

AND

JACKSON CHAMIR ..... 1ST RESPONDENT

LAND REGISTRAR WEST POKOT COUNTY ..... 2ND RESPONDENT

HON ATTORNEY GENERAL ..... 3RD RESPONDENT

(Being an appeal from the Ruling of the Environment & Land Court at Kitale (Mwangi Njoroge, J.) dated 26th March, 2019 in ELC Case No. 107 of 2018)

JUDGMENT

1. This is an appeal from a ruling of the Environment & Land Court delivered on 26th March, 2019 in which the appellant's suit was struck out for being *res judicata*. Costs of the suit were awarded to the 1st respondent.

2. By an application dated 15th January, 2019 the 1st respondent sought orders that; the appellant's entire suit be dismissed for being *res judicata*; and the costs of the application and the entire suit be awarded to the 1st respondent.

3. The application was on the grounds that: the appellant, together with the 2nd plaintiff had sued the 1st respondent in Kitale HCCC No. 5 of 2006; in the said suit,the 1st respondent contended that he had bought and taken possession of West Pokot/Kapsait/694 hereinafter "the suit land" in 1970; a survey confirming that the suit land belonged to the 1st respondent was conducted pursuant to the order of the court dated 20th February, 2014; an eviction order was issued against the appellant on 22nd October, 2014; the appellant's application, Civil Application No. 21 of 2015, seeking leave to file an appeal out of time was dismissed; the appellant sought to re-litigate issues already determined by the court.

4. In her response, the appellant contended that the suit contained a different cause of action and sought different orders from Kitale HCCC No. 5 of 2006; the issue before court was the title to the suit land as opposed to the boundary dispute in Kitale HCCC No. 5 of 2006; the application before the Court of Appeal did not address the issue of ownership; the issue of cancellation of title had not been determined on merit; the special circumstances in the suit were that, there was change of names and title of the register while the suit was still ongoing; title had been issued in appellant's name in 2003 but the same was later issued in the 1st respondent's name after the determination of the boundary dispute; there was no counterclaim in Kitale HCCC No. 5 of 2006 and as such the only issue for determination was the boundary dispute. The facts in Kitale HCCC No. 5 of 2006 were as follows:

5. The appellant and the 2nd plaintiff sued the 1st respondent. Their claim was that they owned plots 51 and 54 while the 1st respondent owned plot 52. They alleged that the 1st Respondent had trespassed on their plots and tried to erect a structure thereon. Their prayer was for rectification of the boundary.

6. The 1st respondent contended that he was not the owner of plot 52 as alleged. He alleged to be the owner of plot 54. He stated that he bought and took possession of plots 51, 54 and the suit land from the appellant's late father and his brother and the then 2nd plaintiff's husband. In 1985 he licensed the then 2nd plaintiff's husband to utilize plot 51. Upon the demise of the then 2nd plaintiff's husband, the appellant tried to alienate plot 51 without the 1st respondent's consent, and also took possession of the suit land. The 1st respondent alleged that the appellant and the 2nd plaintiff had trespassed on his land. He also alleged that the suit was not properly before court as there were pending appeals before the Minister under the *Land Adjudication Act.*

7. By consent, parties agreed to have the parcels in dispute, being plots 51, 54, 783 and the suit land, surveyed so as to ascertain the owners, acreage and occupation. Subsequently, the surveyor's report dated 2nd April, 2014 was adopted and judgment entered in the following terms: plot 51 belonged to the 2nd plaintiff, plot 783 belonged to the appellant while plots 54 and the suit land belonged to the 1st respondent. The suit land was at the time occupied by the appellant.

8. In the suit giving rise to the present appeal, the appellant alleged that she had acquired a title deed by first registration, and her rights to the land were indefeasible. She contended that the cancellation of her title in 2009 and the registration of the said title in the 1st respondent's name was illegal and fraudulent, null and void. Her claim was that the boundary dispute did not resolve the issue of ownership of titles.

9. The learned Judge in his judgment observed that the plaintiff in the previous suit was the same as the plaintiff in the suit before him over the same subject matter, the suit land. The learned Judge also noted that the issue in dispute in the previous suit was boundary rectification while in the suit before him the issue in dispute was ownership of title. However, the learned Judge found the suit to be res judicata by dint of the consent judgment entered on 20th February, 2014 which led to the preparation and filing of the surveyor's report adopted by the parties as final. The learned Judge held that the report finalized the issues raised in the suit before him, and therefore the said issues could not be re-litigated.

10. The learned Judge further held that, the consent judgment dealt with the issue of ownership of the suit land which was the issue raised in the suit before him. That though title was issued in 2003 in the appellant's name, upon the determination of the boundary dispute, another title was issued in the 1st respondent's name. The learned Judge further noted that under the *Land Adjudication Act*, if a decision does not favour the registered owner, the Minister orders the change of registration particulars to reflect the name of the person in whose favour the Minister's decision was made.

11. The learned Judge observed that the appellant was silent on whether any appeal existed or any appeal had been decided in relation to the suit land. He proceeded to hold that by virtue of Section 7 of the *Civil Procedure Act*, the issue of ownership of land and by extension, matters relating to the appeals before the Minister should have been fully litigated in the first suit. That even though the appellant contended the issue of ownership was not dealt with, the same was determined by the consent of the parties.

12. The learned Judge noted that it was trite that a consent voluntarily entered into by the parties could not be casually set aside. (See: *Board of Trustees NSSF v Michael Mwalo* [2015] eKLR). He concluded by stating that; the suit had not sought to set aside the consent order, the parties in both suits were the same, the subject matter and the claim were the same and the jurisdiction of the two courts was concurrent. Therefore, the issues were directly and substantially in issue in both suits. The suit was struck out for being *res judicata*.

13. Aggrieved, the appellant filed the present appeal in which she raised seven grounds to wit; that the learned Judge erred in law and in fact by: determining the suit in favour of the 1st respondent; dismissing her entire suit for being *res judicata*; finding that the consent determined issues that were in essence illegal, such as cancellation of title without following the due process of the law; construing the consent judgment outside its parameters; and that the court applied the principle of res judicata to extreme and borderline interpretation, leading to gross injustice.

14. When the appeal came up for hearing, Mr. Maritim appeared for the appellant, Mr. Wanyama appeared for the 1st respondent whereas Mr. Cheruiyot appeared for the 2nd and 3rd respondents. Counsel relied on their written submissions which they briefly highlighted, save for Mr. Wanyama who submitted orally.

15. Counsel for the appellant submitted that the issue of ownership arose after the consent order and it was different from the boundary issue in Kitale HCCC No. 5 of 2006. He contended that the issue of cancellation of title had never been determined by a court of competent jurisdiction. Relying on the cases of *IEBC v Maina Kiai & 5 Others* [2017] eKLR and *Henderson v Henderson* [1843-60] All ER 378, counsel maintained that the finding by the learned Judge that the matter was *res judicata* was irregular.

16. As regards the consent order, counsel submitted that the surveyor's report as adopted settled the boundary dispute but did not allow for cancellation of title, hence the said cancellation by the registrar was wrong. The issue of ownership of the suit land was not determined.

17. Opposing the appeal, counsel for the 1st respondent submitted that the order in Kitale HCCC No. 5 of 2006 dealt with the issue of ownership, acreage and occupation of the suit land. The appellant wanted to re-litigate the issue of ownership. If indeed there was an issue, the appellant should have sought recourse in Kitale HCCC No. 5 of 2006.

18. In opposing the appeal, the 2nd and 3rd respondents' counsel reiterated that the issue of ownership of the suit land was determined in the consent and the suit giving rise to the present appeal on ownership was res judicata. The appellant should have sought to set aside the consent. Counsel submitted that res judicata is a fundamental principle of law that no party shall be impleaded or tried more than once over a similar issue where a court of competent jurisdiction has already pronounced itself on merit. Counsel contended that the joinder and removal of parties from the two suits did not change the issues in contention. He stated that the consent judgment conclusively settled the issues of trespass and ownership of the suit land and an attempt to raise the issue of ownership amounted to an abuse of the court. To buttress his submission, counsel relied on the following cases: *IEBC v Maina Kiai*

& 5 Others (*supra*); *Rose Njeri Munoru & 13 Others v Hannah Mwihaki Muturi & 4 Others* [2014] eKLR; and *Henderson v Henderson* (*supra*).

19. On whether the consent judgment was binding, counsel submitted that the said consent was never set aside on appeal as the application for leave to file a notice of appeal out of time was dismissed. Counsel pointed out that, since the consent had not been varied by consent, set aside on appeal or vacated on application, the consent judgment had not been disturbed and therefore the suit before the trial court was *res judicata*. Counsel concluded that the learned Judge was justified in making a finding that the consent judgment had resolved the issue of ownership of the suit land with finality.

20. We have carefully perused the record, rival submissions by counsel, cited authorities and the law. The issue for determination is whether the trial court was right in holding that the suit was res judicata.

21. This being a first appeal, we are called upon to reconsider, re-evaluate and draw our own conclusions. In the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR this Court held as follows:

> " An 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."

22. As stated elsewhere in this judgment, the appellant filed HCCC No. 5 of 2006 against the 1st respondent seeking to resolve a boundary dispute. As a result of the judgment, her title to the suit land was cancelled and the suit land was registered in the 1st respondent's name. Her efforts to appeal against the judgment were thwarted when her application to file a notice of appeal out of time was dismissed. This prompted the appellant to file ELC Case No. 107 of 2018 disputing the cancellation of her title to the suit land. The trial court held that the suit was *res judicata* by dint of the consent judgment in which a surveyor's report on ownership, acreage and occupation was adopted as judgment of the court.

23. It was the appellant's contention that the issue of ownership and cancellation of title was not conclusively determined by a court of competent jurisdiction and therefore, the suit was not *res judicata*.

24. Section 7 of the *Civil Procedure Act* provides for the principle of res judicata. It states as follows:

> 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.

25. In the case of *Henderson vs Henderson* (*supra*), the Court held thus:

> " .....where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the 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, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every

point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time..."

26. The principle of *res judicata* was further expounded by this Court in the case of *IEBC v Maina Kiai & 5 Others*, (*supra*) as follows:

> " 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 disjunctive 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."
>
> > " ...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, 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."

27. The Supreme Court in the case of *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & Another* [2016] eKLR held as follows regarding the doctrine of *res judicata*:

> " 52. Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights."

28. The Court further held:

> " 54. The doctrine of *res judicata*, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures

that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively."

29. In the present case, we have noted that the appellant sought for the rectification of a boundary but in the course of the proceedings, it emerged that she was in occupation of the 1st respondent's parcel of land. What is not lost to us is that in the process of litigation, parties saw the need to involve a surveyor in the process and as a result, a consent order was adopted, to the effect that the surveyor would determine the ownership, acreage and the occupants of the disputed parcels, including the suit land. When the surveyor's report was submitted, it indicated that the suit land belonged to the 1st respondent but it was the appellant who was in occupation. As a result, her title to the suit land was cancelled and the same was registered in the 1st respondent's name. An eviction order was also issued against the appellant. The appellant attempted to appeal against the said judgment but when all failed, she filed the suit the subject of the present appeal.

30. To our minds, this is a clear demonstration that the issue of ownership of the suit land was alive in the previous suit and the current suit which led to the present appeal. The trial court in HCCC No. 5 of 2006 having held that the issue had been determined with finality, through the consent adopted by the court, and that the 1st respondent was the owner of the suit land; the matter could not be revisited by way of another suit under the guise that the appellant was disputing the cancellation of her title to the suit land. The cancellation of the appellant's title followed the event. If the appellant was indeed aggrieved, we hold the considered view that she should have appealed or sought a review of the judgment in HCCC No. 5 of 2006. The argument that the claim arose after judgment is neither here nor there as parties are not permitted to litigate in instalments. The bottom line is that the issue of ownership of the suit land was an issue in the previous suit and was also an issue in the current suit, from which this appeal arose. The suit was between the same parties or those claiming under the same title and the same was determined by a court of competent jurisdiction, albeit by consent of the parties.

31. In the light of the foregoing, we are satisfied that the trial court was right in making a finding that the suit was *res judicata*. Accordingly, we uphold the trial court's ruling and order that the appeal be and is hereby dismissed with costs.

32 Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 16TH DAY OF JUNE, 2023.

F. SICHALE

.....

JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR