Ali & another v Sultan Palace Development Ltd (Civil Appeal E023 of 2020) [2023] KECA 977 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KECA 977 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E023 OF 2020

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

JULY 28, 2023

BETWEEN

MBARAK SAID ALI ..... 1ST APPELLANT

SALIM MKOTA KOMBO ..... 2ND APPELLANT

AND

SULTAN PALACE DEVELOPMENT LTD ..... RESPONDENT

(Being an appeal from the decision and orders delivered by J. Olola, J. on 5th November 2020 in Mombasa ELC Case 29 of 2019 (OS))

JUDGMENT

1. Mbarak Said Aliand Salim Mkota Kombothe appellants challenges the decision and orders rendered by J. Olola, J. on 5th November 2020 in Mombasa Environment and Land Court (ELC) Case No. 29 of 2019 (OS). The learned ELC Judge struck out the O.S. for adverse possession of LR MN/III/1075 (hereinafter the suit property) with costs for being res judicata, misconceived, and an abuse of court process.

   Aggrieved by the ruling of the ELC, the appellants filed this appeal. In their memorandum of appeal ten (10) grounds are raised which can be summarized as: The learned ELC Judge erred in law and fact for:

   i. Making a finding that the *ELC Case No. 29 of 2019* was *res judicata* despite the fact the High Court in HCCC No. 375 of 2009 was not competent to hear the matter, and for the fact an extract of the suit title was annexed to the suit, making it uncertain whether the suit property in both cases were the same.

   ii. For making a finding that the suit was res judicata without evidence the claim for adverse possession in HCCC No. 375 of 2009 was heard and finally determined.

iii. For failing to find that the property in the Conditional Consent letter, Plot No. 1075 SectionIII MN was different compared with LR MN/III/1075 which was pleaded as the subject matter in *ELC No. 29 of 2019 (O.S.)*; Further for accepting affidavit evidence which declared the two properties were one and the same; and for applying the principle of reversal which is foreign in Kenya, holding that the Plot No. 1075 SectionIII MN in HCCC No. 375 of 2009 needed to be reversed to match up with the description LR MN/III/1075 in *ELC No. 29 of 2019*.

iv. For finding that the parties in HCCC No. 375 of 2009 are the same as in *ELC No. 29 of 2019*, yet the respondent admitted that the defendant in both cases were different.

v. For finding the Conditional Consent Letter a binding agreement and enforcable where each party took a benefit that was endorsed by the Court.

vi. For finding that the appellants had accepted Kshs. 900, 000/- from the respondent's predecessor in title to relinquish their interest in LR MN/III/1075.

vii. By holding that the calculation of time for any previous possession of LR MN/III/1075 by the appellants had stopped running

viii. By holding that time for purpose of a claim for adverse possession by the appellants begun running on the 11th March 2011when the respondent purchased the suit property.

2. The appellant sought that the impugned ruling be set aside and substituted with an order allowing the appellants' suit as prayed. Also sought was an order dismissing the preliminary objections and applications dated 20th and 26th November 2019.

3. This is a first appeal. We have considered the appeal in accordance with our mandate. See *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 and also *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR. In the latter case, the Court pronounced that the primary role of the Court in a first appeal is:

> "... to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

Background

4. The appellants by way of Originating Summons (O.S.) dated 7th February 2019, against Sultan Palace Development Ltd, the respondent herein, filed the suit claiming proprietorship by way of adverse possession pursuant to the provision of *Limitation of Actions Act*, cap 22. The appellants sought, among other orders that they are entitled to be declared proprietors of LR No. MN/III/1075 by virtue of adverse possession.

5. The appellants filed a Notice of Motion dated 16th August 2019 seeking to have the respondent restrained from interfering with their occupation and quiet use and enjoyment of the suit property. They later withdrew the application in favour of the matter being heard on the merit.

6. The respondent, in response to the OS, filed a Notice of Preliminary Objection [PO] dated 20th December 2019 in which they objected to the hearing of the OS on the following grounds;

i. The suit was fatally defective as the mandatory 12 years period required in a claim of adverse possession had not crystallized as against the respondent since they acquired title to the suit property on 23rd November 2011;

ii. That the suit was incompetent as the respondent had acquired the suit property from previous registered owners of the suit title, the National Social Security Fund Board of Trustees, which is a State Corporation, against which time for a claim of adverse possession could not be computed under section 41 (a) (i) of the *Limitation of Actions Act*;

iii. The applicants' suit be struck out with costs.

7. On the 26th November 2019 the respondent filed a notice of motion in which the following prayers were sought:

i. Moot.

ii. The Motion be heard together with the PO dated 20th November 2019;

iii. The Hon. Court be pleased to strike out the OS as the same is bad in law and an abuse of the process of the court;

iv. The OS is *res judicata*;

v. The Hon. Court orders the applicants be removed/evicted from the suit property; and,

vi. The costs of the application and the suit be borne by the applicants in the OS.

8. In support of the application was an affidavit sworn by General Manager of the respondent company. We have considered the content of the affidavit. The affidavit gives supporting evidence to both applications to demonstrate why the OS was *res judicata*. It was deposed that the suit was compromised when appellants and the counsel for the respondent then on record, entered into a written consent dated 19th May 2010 settling HCCC No. 375 of 2009 (O.S.).

9. The appellants in their response to the PO and the application to strike out the suit for being res judicata filed Grounds of Opposition dated 30th December 2019. Four grounds were raised, that no single element of res judicata as stipulated under section 7 of the *Civil Procedure Act* [CPA] was demonstrated to exist. That the parties in HCC No 375 of 2009 (OS) are different from those in the present suit. The subject matter directly and substantially in issue in HCC No. 375 of 2009 and in present suit were different. That there has never been a final judgment or any judgment on the merits concerning the same parties in the present suit over the same subject matter, and no decree or final adjudication of the matter was produced. That the application was an abuse of the court process.

10. We heard this appeal through the virtual platform of this Court on the 24th November 2022. Present at the hearing was learned counsel Mr. Kevin Okere for the appellants, while learned counsel Mr. Tonny Odera was present for the respondent.

11. Mr. Okere relied on his written submissions and list of authorities dated 21st November 2022. Mr. Odera relied on his written submissions and list of authorities dated 18th November 2022, and the supplementary record of appeal dated 21st November 2022. Both counsels highlighted their respective submissions before us.

Submissions

12. Mr. Okere for the appellants urged four grounds. He urged that no single element of res judicata as stipulated under section 7 of the *Civil Procedure Act* [CPA] was demonstrated to exist. That the parties in HCC No. 375 of 2009 (OS) are different from those in the present suit.

13. The subject matter directly and substantially in issue in HCC No. 375 of 2009 is Plot No. 1075/III/MN, whereas the subject matter in present case is LR No. MN/III/1075, which has never been directly or substantially in any former suit between the parties to the present suit. That there has never been a final judgment or any judgment on the merits concerning the same parties in the present suit over the same subject matter, and no decree or final adjudication of the matter was produced.

14. Mr. Okere submitted that the learned ELC Judge committed a palpable error in his ruling dated 5th November, 2020 when he deemed the consent in HCC 375/2009 as comprising a valid consent Judgment and on that basis allowed the PO and the Motion on the basis of three findings. One, the learned Judge held that the consent altered computation of time for purposes of adverse possession and the application of the doctrine of res judicata, holding the dispute over the suit property had been finally determined. Two, the Judge elevated the conditional consent to the status of legitimate consent judgment, which did not meet the criteria as it was not recorded or adopted as a consent.

    Three, the learned Judge altered suo moto the appellants' disposition and arguments by holding that Plot No. 1075/III/MN, Plot No. 1075 SectioN III MN and Plot No. MN/III/1075 all refer to the same parcel of land.

15. Mr. Okere relied on the Court of Appeal decision in *Wilson Kazungu Katana & 101 others v Salim Abdallh Bakshwein & another* [2015] eKLR for the proposition that identity of the land in possession is an integral part of adverse possession, and that the failure to annex an extract of the title rendered the OS incompetent. On that basis, counsel argued that HCC 375/2009 lacked power to determine an incompetent OS, and same could not be remedied by a purported consent. He urged that jurisdiction could not be inferred by consent or be assumed on the grounds the parties have acquiesced in actions that presume the existence of such jurisdiction.

16. Citing *Jamal Salim v Yusuf Abdullahi Abdi & another* [2018] eKLR he urged that since the subject matter in 375/2009 could not be identified, a finding of *res judicata* in *ELC 29 of 2019* was erroneous.

    He relied on *Rosemary W. Maingi v Wilson G. Mbuthis* [2018] eKLR where the High Court declined to recognize alleged consent entered in the lower court 'since no record minuting the receipt of the consent and adoption which should be indicated in the actual court proceeding.' Mr. Okere submitted the Respondent never tendered such proceedings in HCCC No. 375 of 2009 (OS) adopting the 'consent'.

    In addition, the Respondent never tendered proof of any document, order or decree that indicated that the issues raised in HCCC No. 375 OF 2009 (OS) had been finally determined by a court of competent jurisdiction.

    Regarding section 7 of the *CPA*, counsel cited *Chacha Matiko Mwirinyi v Martha Mhusiro Mwita & another* [2018] eKLR, where it was held:

> "In the instant suit, there is nothing to show final settlement of disputed issues by orders issued in Kisii HCCC no. 11 of 1988. The defendants have not satisfactorily exhibited any document to reveal the nature of matter, the parties and the final decision rendered in the former suit."

17. Mr. Okere challenged the introduction of a supplementary record of appeal, in which an order issued on 2nd February 2021 (almost immediately after this Appeal was filed) claiming it to be, in the index of the supplementary record. We were urged to reject the order citing *Accounting Officer Kenya Ports Authority (Ex Parte) v Public Procurement Administrative Review Board & 3 others* (interested parties) (2019) eKLR; for the proposition the law rejects a consent order recorded in the absence of counsel.

    He urged that the Order was very explicit that it was made in the absence of all the parties, and that the case referred to in the Order is Mombasa ELC No. 375 of 2009 (OS) which is different from HCCC No.375 of 2009 (OS).

18. Mr. Odera started by urging that our laws under section 7 of the *Civil Procedure Act* statutorily recognize the doctrine of res judicata. He relied on the supreme court decision in *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* {2017} eKLR, for the proposition that for the bar of res judicata to be effectively raised all the elements that constitutes the doctrine under section 7 of the *CPA* must be met, and that they are conjunctive and not disjunctive.

19. Mr Odera submitted that the appellants filed in the ELC Court in Malindi, *ELC Case No. 29 of 2019*(OS) with the parties named as: Mbarak Said Ali, Salim Mkota Kombo v Sultan Palace Development Limited. That in that suit the appellants sought orders of adverse possession over land described as Plot No. MN/III/1075 Grant No. 19153 measuring approximately 8.169 Hectares.

20. That the respondent filed in the trial court the notice of motion dated 26th Nov 2019, pleading the doctrine of res judicata and placing before the court the particulars showing that the appellants had in 2009 filed an earlier suit in the High Court as follows: High Court at Mombasa i.e. HCCC No. 375 of 2009 (OS) with the parties: *Mbarak Said Alt, Salim Mkota Kombo v Board of Trustees of National Social Security Fund*. The Appellants sought Orders of adverse possession over land described as Plot No. 1075/III/MN Grant No. 19153 measuring approximately 8.169 Ha. He urged that the respondent in latter suit purchased the suit property form the respondent in the former suit, and referred us to the record of appeal to the transfer dated16th November 2011, evidencing the said transfer.

21. Mr. Odera referred the Court to the record of appeal and urged that the matter was conclusively determined and a mutual consent dated 19th May 2010 was signed by Counsels for both parties and filed in Court on 20th May 2010. The consent was an exhibit in the record of appeal. He urged that the Consent was adopted on 21st March 2017 as an Order of the Court.

22. Mr. Odera urged that the learned Environment and Land Court (ELC) Judge did not err in his interpretation and application of Section 7 of the *Civil Procedure Act* and consideration of the doctrine of res judicata. He sought for dismissal of the appeal.

23. After considering the submissions and cases and the law relied upon by counsel to the parties, and the evidence and the pleadings placed before the Environment and Land Court (ELC), we find that the issues that fall for our determination are two;

    i. Whether the suit was *res judicata*?

    ii. Whether the appellants claim for adverse possession against the respondent had crystallized?

24. Res judicata is a doctrine of law with statutory under pinning under section 7 of the *Civil Procedure Act* [CPA]. That section provides:

    > " 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 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 supreme court case of *IEBC v Maina Kiai & 5 others* [2017] eKLR, the Court held:

> " Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;
>
> i. The matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit;
>
> ii. The former suit must have been between the same parties or privies claiming under them;
>
> iii. The parties must have litigated under the same title in the former suit;
>
> iv. The court which decided the former suit must have been competent to try the subsequent suit; and
>
> v. The matter in issue must have been heard and finally decided in the former suit.

26. The issue is whether the learned ELC Judge applied the correct principles in determining whether the suit was res judicata.

27. The appellants' complaint is that the identity of the land in possession was an integral part of adverse possession and that failure to annex an extract of the title rendered the OS incompetent. He urged that the title certificate of the land claimed in the HCC 375 of 2009 was not attached and therefore it was uncertain which land was claimed, and that in the circumstances, res judicata did not arise. They also urged that the High Court had no jurisdiction to hear land cases, and that therefore the finding of res judicata could not be made. The appellants urged that the consent should not be recognize for lack of record proving receipt of the consent by the court.

Finally, that there was no proof the Plot 10775/III/MN pleaded in HCC 375/2009 was the same parcel as Plot No. MN/III/1075 pleaded in ELC No. 29/2019.

28. The learned ELC Judge considered the question whether the suit was res judicata and delivered himself thus:

> " From the material placed before me. I had no hesitation in concluding that the subject matter of the dispute is one and the same. I say so because it was evident from a perusal of a copy of their originating Summons dated 6th October 2009 that the subject matter in the former suit was a parcel of land described as Plot 1075/III/MN Grant No. 19153 measuring approximately 8.169 Hectares.
>
> The description of the Parcel Number in that former suit was nothing but a reversal of the description of the property in this present suit wherein the property is described as Plot No. MN/III/1075 Grant No. 19153 measuring 8.169.
>
> Secondly and of greater significance, the 1st Plaintiff [1st respondent] in his affidavit in both the former and the present suit avers that he has resided in the said suit property all his life and that he has developed the same by constructing a semi-permanent house and panting

coconut trees thereon. I did not think that it was possible for the 1st plaintiff to have lived all in two different parcels of land and I found no basis of that contention"

29. We have analyzed and examined afresh the evidence before ELC. The first thing to note is that the appellants filed the suits in question. HCC No. 375 of 2009 was the first filed in the High Court before the ELC were created in 2012 following the promulgation of the *Constitution* 2010, and the enactment of the Land Laws in 2012.

30. The first test in determining if the suits are *res judicata* is considering whether the matter directly and substantially in issue in the subsequent suit was directly and substantially in issue in the former suit. There is no dispute that the subject matter that is directly and substantially in issue in the two suits, HCC No. 375 of 2009 and the latter suit, ELC No. 29 of 2019, were claims of interest in land through adverse possession.

31. The second test is whether the former suit was between the same parties or privies claiming under them. There is no dispute that the appellants were the Plaintiffs in both suits. There is no dispute that the defendants were different. The defendant in HCC 375 of 2009 was the Board of Trustees of the NSSF [herein after Board of Trustees]. The defendant in the latter suit is the Sultan Palace Development Limited [herein after Sultan Palace]. As to the difference in the name of the defendant in each case, the respondent has urged that the defendant in HCC 375 of 2009 was the Board of Trustees and that it sold the land to the Sultan Palace while the former suit was in Court.

32. The sale agreement between the Board of Trustees and the Sultan Palace is annexure LT-1 in the affidavit sworn by the General Manager of the respondent.

    It is dated 11th March 2011. The Memorandum of Registration of Transfer of Lands between the two parties is dated 16th November 2011, and is annexure LT-2 of the same affidavit, from the Board of Trustees to Sultan Palace is annexed in the record of appeal. It is dated 16th November 2011.

    The Certificate of Lease is LT-3 to the same affidavit and is proof Sultan Palace are the registered owners of the suit land. The transaction between the respondent in the present suit and the defendant in the former suit shows there is privity between the two parties, which is the suit land.

33. On the third test, the parties must have litigated under the same title in the former suit. This is true of the appellants; they litigated under the same title. They then first sued the defendant, Board of Trustees in HCC375 of 2009 as the registered owner of the suit property. After the defendant sold to the respondent, the respondent was sued in its capacity as the owner of the suit property. The third test was equally met.

34. On the fourth test of whether the court, which decided the former suit, was competent to try the subsequent suit. The appellant has challenged the jurisdiction of the court the High Court to try HCC No. 375 of 2009.

    They argue that as the Court had no jurisdiction, not being an ELC Court, then any consent emanating from that court should be rejected.

    The suit HCC No. 375 of 2009 was filed before the High Court since at the time, and we take Judicial Notice, the court that had jurisdiction to hear Land cases. The argument that it had no jurisdiction has no basis and we reject it.

35. The fifth test is whether the matter in issue was heard and finally decided in the former suit. This fact is highly contested by the appellant. The basis of finding that the former suit was fully determined was a consent entered into between the appellants and the Board of Trustees. The appellants did not deny

that the consent existed. Their argument is that it is not valid due to procedural flaws, and further for lack of proof the money agreed upon was paid to the appellants.

37. Was there a consent between the appellants and the Board of Trustees? The respondent has, in its affidavit by its General Manager annexed LT-5, which is an agreement between the appellants and the Board of Trustees. It is addressed to the Deputy Registrar of the High Court Mombasa. It is referenced the case number and the parties of HCC No. 375 of 2009, being the appellants and the Board of Trustees. It is signed by the parties advocates. It bears the Received Stamp of the High Court.

38. The very first sentence of the consent is a request as follows:

> " We the undersigned shall be grateful if you could record the following consent"

39. The terms of the agreement are as follows:

> " By consent the suit herein is settled in the following terms:
>
> 1. ....
> 2. the defendant do pay the 1st and 2nd Plaintiffs a gratuitous sum of Kshs. 950, 000/- all-inclusive as detailed herein below:
>
> 1stPlaintiff 400, 000/-
>
> 2nd Plaintiff 400, 000/-
>
> Party & party costs 150, 000/-
> 3. That the said payment by the Defendant to the 1st and 2nd Plaintiffs in full and final settlement of the entire suit herein and/or of all claims by the Plaintiffs against the Defendant and its suit property Plot No. 1075 Section III MN.
> 4. ....
> 5. That the Plaintiffs shall vacate the Defendant's property ...
> 6. That upon the payment of the sums as specified in paragraph (2) above, any further suit filed by the 1st and 2nd Plaintiffs or their agents whatsoever regarding the suit property herein, the suit so filed shall be deemed Res-Judicata and null and void ab initio.
>
> Dated at Mombasa 19th May 2010
>
> Signed
>
> Cootow & Associates Advocates for the Defendant
>
> Sifuna & Company
>
> Advocates for the 1st & 2nd Plaintiffs"

40. Having cognizance of the above agreement, we find that the advocates to the appellants and the Board of Trustees forwarded the consent agreement to the Deputy Registrar of the High Court and requested that the agreement be recorded as a consent of the parties. The second fact is that it is the parties' advocates who signed the consent on behalf of their clients, which they are mandated to do.

41. The other fact is that the terms of the consent is clear, making the consent final settlement of the suit and of any other claim the appellants or persons claiming through or under them may have over the suit property.

42. We find that the appellants' complaints in regard to the consent agreement had no legal or factual foundation. The agreement was between the appellants and the defendant in HCC 375 of 2009. The advocates signed it and filed it in Court, and the Court stamp on the document is proof. The terms were very clear. The supplementary record of appeal confirms the Court the stamp on the face of the agreement, that it was received. The record also confirms that the consent was adopted by the court, which was done on 21st March 2017, as the parties requested.

43. The learned ELC Judge was satisfied that the subject matter in HCCC 375 of 2009 and the appellants' originating summons were the same. It was noted that the subject matter in HCCC 375 of 2009 was Plot No. 1075/Section III/MN Grant No. CR 19153 measuring 8.169 Ha, whereas in the originating summons the property is Plot No. MN/III/1075 Grant No. 19153 measuring approximately 8.169 Ha.

    The court also noted the averments in both suits were that the 1st appellant lived on the suit land and deduced that it was not possible for the 1st appellant to live all his life in 2 different parcels of land.

    The court considered that the respondent in HCCC 375 of 2009 was the National Social Security Fund (NSSF) but that the claim in both suits was for adverse possession.

44. The court was also cognizant of the consent recorded on 20th May 2010, and the agreement to sell the suit land vide agreement executed on 11th March 2011 between the respondent and National Social Security Fund NSSF. The court found that the said consent determined any claim the appellants had on the suit property; that the consent rendered any future claim over the suit property by the appellants' res judicata.

    In view of the sale agreement dated 11th March 2011, the learned Judge concluded that the respondent was in possession of the suit land for only 8 years before institution of the subject suit on 14th May 2019; that the claim for adverse possession had not crystallized. We agree with the learned Judge's findings that the suit property in HCC No. 375 of 2009 was the same as in ELC No. 29 of 2019.

    The 1st appellant's averment that he lived in the parcels described in the two suits herein can only mean the two parcels in the two cases are one and the same.

    We cannot fault the learned trial Judge who thought that the difference in the description of suit land was inversion by the appellant that filed the two suits and find that he cannot be faulted for arriving at this conclusion.

45. The last issue we wish to mention is whether a preliminary objection can be well taken on res judicata. It was held in *Omondi v National Bank of Kenya Ltd & others* (2001) KLR 579; that:-

> " The objection as to the legal competence of the plaintiffs to sue in their capacity as directors and shareholders of the company under receivership, and the plea of Res judicata are pure points of law which if determined in the favour of the respondents would conclude the litigation and they were accordingly well taken as objection ... In determining both points the court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on the matters ..."

46. Having analyzed, evaluated and examined afresh the pleadings, evidence and the submissions and cases relied upon by the appellants and the respondent, we have come to the finding that the learned

Environment and Land Court (ELC) Judge applied the principles applicable to the issues raised before him in this matter, and that he arrived at the correct finding. The appellants appeal has no merit and is dismissed in its entirety with costs to the respondent. Consequently, the ruling and orders of the learned Environment and Land Court (ELC) Judge delivered on the 5th November 2020 are upheld and confirmed.

47. Those are our orders.

DATED AND DELIVERED IN MOMBASA THIS 28TH DAY OF JULY, 2023

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

.....

P. NYAMWEYA

JUDGE OF APPEAL

.....

J. LESIIT

JUDGE OF APPEAL

.....

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

Signed

DEPUTY REGISTRAR