Jiwa & another v Jiwa (Suing as a Trustee of Kulsumbhai Trust) & another (Environment and Land Appeal 6 of 2023) [2024] KEELC 3706 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3706 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL 6 OF 2023

NA MATHEKA, J

APRIL 25, 2024

BETWEEN

YUSUF JIWA ..... 1ST APPELLANT

NAUSHA JIWA ..... 2ND APPELLANT

AND

AUN JIWA (SUING AS A TRUSTEE OF KULSUMBHAI TRUST) ..... 1ST RESPONDENT

ROSEMIN NAZERILI JIWAS (SUING AS TRUSTEE OF KULSAMBHAI TRUST) ..... 2ND RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment of the Chief Magistrate's Court Mombasa delivered on 27th February 2018 by Hon. JM. Nang'ea CM in CMCC NO. 618 on the following grounds;
    1. The learned trial Magistrate erred in law and in law in hearing and determining a matter for which the court lacked jurisdiction.
    2. The learned trial Magistrate erred in law and in fact in making a finding that the Respondents had established their case on a balance of probability while there was no or sufficient evidence to support this finding.
    3. The learned trial Magistrate erred in law and in fact in holding that the Respondents had locus standi to sue and whether they were suing as trustees or registered owners.
    4. The Learned trial Magistrate erred in law and in fact in holding that the Respondents were not bound to give reasons in the Notice to terminate tenancy.

5. The Learned trial Magistrate erred in law and in fact in finding for the Respondent based on pleadings and a notice which were incurably defective notwithstanding amendments.

6. The Learned trial Magistrate erred in law and in fact in ordering the Appellants to pay mesne profits from December 2009 till vacant possession while it was abundantly clear that no rent was due.

7. The Learned trial Magistrate erred in fact and in law in failing to appreciate the already demonstrated fact that the Notice to terminate tenancy and the subsequent suit were actuated by malice and entrenched family hatred and not for any valid legal ground.

8. The Learned trial Magistrate erred in fact and in failing to consider the fact that the Respondents were not just mere tenants but were also the grandchildren of the settlor of the Trust who had occupied the suit premises as tenants for over 25 years.

9. The Learned Magistrate erred in law and in fact in failing to consider the defence presented by the Appellants which defence was cogent and truthful.

2. The Appellant prays that this appeal be allowed and the suit by the Respondent in the lower court be dismissed with costs.

3. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and make a determination as to whether the conclusion reached by the trial magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in *Mbogo and another v Shah* [1968] EA 93 where it was held that;

> I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do."

4. I am also guided by the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR where the Court held that;

> this being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of a 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 allowance in this respect."

5. At the trial court the plaintiffs/respondents sued the defendants as Trustees of Kulsumbai Trust the owners of the suit property. That the defendants were tenants and despite being served with notice had refused to vacate. After trial the court made the following orders;

    1. That the defendants give vacant possession of the flat situated on Mombasa/Block XXVII/22.

    2. That the defendants be compelled to pay mesne profit from December 2009 until vacant possession is handed over at the rate of kshs. 10,000/= per month.

6. Counsel for the appellants informed the court that the 2nd appellant was deceased and he would only proceed with the 1st appellant. The appellant has challenged the issue of jurisdiction and locus standi in this appeal. The preliminary issue for determination here was whether the court could entertain suit for being res judicata. 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"

7. The *Black's law Dictionary* 10th Edition defines "res judicata" as

> "An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."

8. A person may not commence more than one action in respect of the same or a substantially similar cause of action and the Court must attempt to resolve multiple actions involving a party and determine all matters in dispute in an action so as to avoid multiplicity of actions.

9. Kuloba J, in the case of Njangu v Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported), held that:

> 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata....."

10. In the case of *Christopher Kenyariri v Salama Beach* [2017] eKLR, the court clearly stated the ingredients to be satisfied when determining res judicata thus;

...the following elements must be satisfied...in conjunctive terms;

a) The suit or issue was directly and substantially in issue in the former suit

b) Former suit between same parties or parties under whom they or any of them claim

c) Those parties are litigating under the same title

d) The issue was heard and finally determined.

e) The court was competent to try the subsequent suit in which the suit is raised."

11. In *E.T v Attorney General & Another* [2012] eKLR where it was held that:

> " The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi v National Bank of Kenya Limited and Others* [2001] EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted

Kuloba J, in the case of *Njangu v Wambugu and another* Nairobi HCCC No.2340 of 1991 (unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata....."

12. Having considered the pleadings and rival submissions by counsel. It is not disputed that there was a matter in the Rent Tribunal giving rise to HCC No. 84 of 2005. The respondent states that that matter was for the assessment of rent for Kshs. 10,000/= and the cause of action in CMCC No. 618 herein is one of vacant possession and mesne profits. That in any event the said suit had been withdrawn. I find that the cause of action in this matter is different from the one in at the Tribunal which was the assessment of rent. The issues in the two matters are substantially different. Secondly, the respondents state that the appeal therein had been withdrawn and no evidence has been adduced to the contrary by the tenants. I find that the trial court had jurisdiction to entertain this matter and the doctrine of res judicata would not apply.

13. On the issue of locus standi, the 1st respondent adduced evidence that he had been appointed attorney by the 2nd respondent and produced a power of attorney and was not a trustee of the property. I find that this is sufficient to accord him locus to pursue the claim and this ground must fail. I concur with the trial magistrate when he states that;

> " The plaintiffs bring the suit claiming to be Trustees in respect of the suit property. The 1st plaintiff (Aun Jiwa – PW1 holds a General Power of Attorney donated by the 2nd plaintiff in 2003 before the suit was filed and testified on her behalf. The 2nd plaintiff herself was done of a General Power of Attorney from the 1st plaintiff who passed on during the pendency of the suit."

14. I am also satisfied that the defendants were served with notice to vacate within 30 days dated 5th October 2009 (Pex 3). The plaintiffs intended to sell the property for the beneficiaries. The defendants are relatives to the plaintiffs and may benefit from the said sale. I do not find any malice on the part of the plaintiffs towards the defendants. On the mesne profits it was not in contention that the appellants were tenants paying rent. I find it is justified that they pay mesne profits of Kshs 10,000/= per month until vacant possession is given.

15. In *Mwanasokoni v Kenya Bus Service* [1982 - 88] 1 KAR 870, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision was judiciously arrived at and will not interfere with the same. The court finds no basis to interfere with the judgement as it was based on cogent evidence. This appeal is dismissed for lack of merit with costs to the respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF APRIL 2024.

N.A. MATHEKA

JUDGE