IN THE COURT OF APPEAL

AT NAKURU

[CORAM: KARANJA, SICHALE & J. MOHAMMED, JJ.A]

CIVIL APPEAL NO. 112 OF 2017

BETWEEN

MUSA WAMBUGU JOHN..APPELLANT

AND

MIRIAM NJOKI GITONGA..1ST RESPONDENT

JOSEPH MAINA GACHUIRU...2ND RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court of Kenya

at Nakuru (Sila, J) dated 25th May 2017.)

IN

Nakuru ELC Case No. 108 of 2011)

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JUDGMENT OF THE COURT

This appeal stems from a judgment delivered by **Sila, J** on **25th May 2017**, in which the learned Judge held, *inter alia*, that the suit filed by the respondent (now appellant) was *res judicata,* his claim over the land having already been determined in Nyahururu PMCC No. 116 of 1995 where it was held that he was not entitled to the said land.

The appellant was aggrieved with the findings of the honourable Judge and in a memorandum of appeal dated **24th July 2017** , listed 10 grounds of appeal faulting the learned Judge's findings namely; in failing to find that the matter directly and substantially in issue in Nyahururu CMCC No. 173 of 1999, ***Musa Wambugu John v Miriam Njoki Gitonga & Others*** (Nyahururu CMCC No. 173 of 1999) was not directly and substantially in issue in Nyahururu CMCC No. 116 of 1995, **Musa Wambugu John v Joseph Mbachia Gitonga & others** (Nyahururu CMCC No. 116 of 1995); failing to find that the parties in Nyahururu **CMCC No. 173 of 1999,** were not the same parties as those in Nyahururu CMCC NO.116 of 1995; failing to find that the parties in Nyahururu CMCC No. 173 of 1999 did not litigate under the same title as in Nyahururu CMCC No. 116 of 1995; failing to find that in Nyahururu CMCC No. 116 of 1995, the Nyahururu Chief Magistrate's court did not have the jurisdiction and neither was it seized with the issues raised in Nyahururu CMCC No. 173 of 1999 and as such could not have made a final determination on issues in CC No. 173 of 1999; failing to find that issues in Nyahururu CMCC No. 173 of 1999 were not heard and determined by Nyahururu Chief Magistrates court in 116 of 1995, in finding that Nyahururu CMCC No. 173 of 1999 was *res judicata*; that the learned judge erred in law and fact in declaring that the proceedings in Nyahururu CMCC No. 173 of 1999 were a nullity; that the learned Judge erred in law and fact in allowing with costs the appeal in Nakuru ELCA No. 108 of 2011, **Miriam Njoki Gitonga & Another V Musa Wambugu John** and in directing the Land Registrar to re-number either the title held by the 2nd respondent or the other title held by **John Mungai Kinyajui** and finally, that the learned Judge erred in law and fact in directing the Land Registrar to correct the appellant's title for parcel No. 418 to reflect one acre or thereabouts and not two acres.

The brief facts in this appeal are as follows: the appellant had instituted Nyahururu SPMCC No. 173 of 1999 seeking, inter *alia*, an order that registration of the 1st respondent as proprietor of land parcel No. Nyandarua/Kiriita Mairoinya Block II Ngaindethia 3551 and subsequent transfer of the aforesaid parcel to the 2nd respondent was illegal, null and void. **On 2nd June 2011**, the trial court entered judgment in favour of the appellant and ordered, *inter alia*, that the registration of the 1st respondent as proprietor of land parcel number Nyandarua/ Kiriita Mairoinya Block II Ngaindeithia 3551 and subsequent transfer of the aforesaid parcel of land to the 2nd respondent was illegal, null and void. The court further ordered the 1st respondent to give vacant possession of the property to the appellant.

Being aggrieved with the aforesaid judgment of the trial court, the respondents moved to the High Court to challenge the same. On **25th May 2017,** the Environment and Land Court (**Sila, J**) while overturning the decision of the trial court stated:

"My holding is that the suit herein filed by the respondent was res judicata. His claim over the land had already been determined in the case Nyahururu PMCC No. 116 of 1995 and it had already been held that he is not entitled to the said land. My decision herein means that the entire proceedings in Nyahururu PMCC NO. 173 of 1999 were a nullity. The court ought never to have heard the case, or upon hearing, ought to have dismissed it for being res judicata. It was wrong for the learned trial magistrate to now give judgment for the respondent and award him the same land that he had lost in a previous suit. On that fault of the magistrate, this appeal must succeed and the parties must be taken back to the situation that they were after the judgment in the case No. 116 of 1995. The decision in that suit is that he respondent was not entitled to the land parcel No. 3551."

It is this decision of the E&L Court that has now provoked the appeal that is before us.

On **19th October 2020**, the parties by consent sought to rely on their written submissions without the necessity of appearing in court via video link. It was submitted for the appellant that the 1st appellate court erred when it nullified the proceedings in Nyahururu PMCC No. 173 of 1999 on the ground that the suit was *res judicata* in view of the existence of two totally different suits which did not have any similarity in substance and nature and that the trial court was justified in hearing and making a conclusive determination in Nyahururu PMCC No. 173 of 1999 and thus urged us to find that the ELC court erred in nullifying the proceedings and as such, set aside the said finding. It was further submitted that the appellant was entitled to the reliefs granted by the trial court and the trial court's judgment ought not to be interfered with. With regard to the cross appeal, it was submitted that the appellant was entitled to mesne profits having been denied use of the suit land from 1996.

On the other hand, it was submitted for the respondents that the 1st appellate Judge was right in dealing with the issue of *res judicata* on appeal since it went into the question of jurisdiction of the trial court and that the existence of a previous decision was canvassed by both parties before the subordinate court and though not pleaded in the subsequent memorandum of appeal, the trial Judge was in order in dealing with the same. For this proposition reliance was placed on the case of ***Odd Jobs V Mubia [1970] EA 476*** cited with approval by this Court in ***Housing Finance Company of Kenya versus J.N Wafubwa [2014] eKLR***. With regard to the claim for mesne profits, it was submitted for the respondents that the appellant did not prove the same since a claim for mesne profits was a special damage claim which must not only be specifically pleaded but also strictly proved. Consequently, the respondents urged the Court to dismiss the appeal with costs.

We have anxiously considered the record, the rival written submissions by the parties, the authorities relied upon and the law. The appeal before us is a second appeal. Our mandate in a second appeal is as has been enunciated in a long line of cases decided by the Court. See **Maina versus Mugiria [1983] KLR 78, Kenya Breweries Ltd versus Godfrey Odongo, Civil Appeal No. 127 of 2007,** and **Stanley N. Muriithi & Another versus Bernard Munene Ithiga [2016] eKLR,** for the holdings *inter alia* that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered.

This matter has a long litigation history dating back to 1995. In our view, the grounds of appeal in the memorandum of appeal can be summarized into two as follows: whether Nyahururu PMCC No. 173 of 1999 was *res judicata* in view of the proceedings in Nyahururu CMCC No. 116 of 1995 and whether the learned Judge erred in law and fact in directing the Land Registrar to correct the appellant's title for Parcel No. 419 to reflect one acre or thereabouts and not two acres. It is indeed not in dispute that there had been previous proceedings between some of the parties herein. The trial court noted as such and stated:

"There appears to have been at least two other suits 493/1993 where the 1st defendant was the plaintiff and the plaintiff herein was the defendant; 116/1995 where the plaintiff herein had sued the 2nd defendant and 3 others. In 116/95 the court was of the view that the matter be dealt with by the land dispute tribunal as it was a matter of trespass. In 493/1993 it appears the plaintiff therein withdrew her suit. The plaintiff herein apparently proceeded to the land dispute tribunals in 116/1995 as land dispute tribunal 3/1999. The tribunal heard the matter and dismissed the plaintiff's claim of trespass. The record shows that the plaintiff herein started appeal proceedings. However, he did not produce evidence to show what became of the appeal". (Emphasis supplied)

The trial court said no more as regards the two previous suits. It is not in dispute that the issue of *res judicata* was not raised in the High Court. Be that as it may, the record shows that on **22nd February 2017** when the matter was scheduled for judgment, the learned Judge stated that there was one critical point of law which the parties appeared not to have addressed him on namely: whether Nyahururu PMCC No. 173 of 1999 was *res judicata* or not since there was evidence of two other cases namely, Nyahururu PMCC No. 493 of 1993 and Nyahururu PMCC 116 of 1995. Consequently, the parties were given 14 days to address the learned Judge on this issue.

The learned Judge while addressing this issue stated:

*"**In her judgment, the learned trial magistrate did acknowledge that there was evidence of previous suits and did acknowledge that the respondent's claim was dismissed within the suit Nyahururu magistrate's court civil suit No. 116 of 1995 after reference to the Land Disputes Tribunal. She did note that there was a record of an appeal against the decision of the tribunal but observed that there was no indication of what happened to the said appeal."***

The learned Judge further went on to say as follows:

"The record before me shows that there were two previous suits namely the cases Nyahururu Magistrate's Civil Suit No. 493 of 1993 and Civil Suit No. 116 of 1995. In civil suit No. 493 of 1193, the plaintiff was the 1st appellant and the defendant was the respondent.

He 1st appellant's claim was for a half share of Plot No.64 in Ngai Ndeithia. Her case was that her late husband held a share in

Ngai Ndeithia but died before balloting for it. It was pleaded that his other wife, Isabella, balloted for the two-acre plot on the understanding that she would hold it in trust for the 1st appellant as well, but instead, she transferred it to the respondent. In the suit, the 1st appellant asked for subdivision of the plot and one half to be registered in her name. This case did not proceed for hearing as it was withdrawn on 15th December 1994. The second suit case No. 116 of 1995 was instituted by the respondent against Josphat Bachia Gitonga, John Kariuki Gitonga, Kiboi Kaguthi and Ngai Ndeithia Public Company Limited. The claim inter alia was for trespass against the first three defendants and for an order that the company be directed to issue the respondent with the requisite documents to get the title deed. The first three defendants are sons of the 1st appellant herein and it was claimed that they had illegally gained entry into land belonging to the respondent. It will be recalled that this case was referred by the trial magistrate to the Land Disputes Tribunal. After hearing the matter, the tribunal's findings were that the father of the respondent was a shareholder in the company; that the same was transferred to Isabella Wanjiku who in turn transferred the plot to the respondent; that the respondent may only inherit one acre of the land i.e. that portion belonging to his mother. The tribunal dismissed the case on trespass and ordered that the respondent be restrained from interfering with land parcel Nyandarua/Kiriita Mairo Inya Block II/3551. It will be observed that it is the same parcel of land in the dispute herein. The respondent preferred an appeal against this decision but the same seems to have been struck out. I am not sure of what action was taken to execute the decision of the tribunal but there is no question that the decision has never been set aside. In my view, it was improper for the respondent to again claim the same land, albeit now against the 1st appellant, when he had already lost his claim for the land, when he sued the sons of the 1st appellant for trespass. It was already held in the previous suit that the respondent had no right over the one acre of the land identified as Plot No.3551 which is the same land in issue in this case. The respondent could not now seek to reverse that decision by suing a different party. It mattered not that the persons sued are different. He had already lost his claim over the land and he could not now seek to appeal that decision by filling a new suit against a different person. His avenue was to appeal against that judgment, or in other acceptable legal channels seek to quash it. He never did any of this. The fact that he sued different parties never changed the substance of the case, which was, who is entitled to ownership of the land parcel No. 3551. My holding is that the suit herein filled by the respondent was res judicata. His claim over the land had already been determined in the case Nyahururu PMCC No. 116 of 1995 and it had already been held that he is not entitled to the said land. My decision herein means that the entire proceedings in Nyahururu PMCC No. 173 of 1999 were a nullity. The court ought never to have heard the case, or upon hearing, ought to have dismissed it for being res judicata. It was wrong for he learned trial magistrate to now give judgment for the respondent and award him the same land that he had lost in a previous suit. On that fault of the magistrate, this appeal must succeed and the parties must be taken back to the situation that that they were after the judgment in the case No. 116 of 1995. The decision in that suit is that the respondent was not entitled to the land parcel No. 3551."

As was clearly alluded to by the learned Judge, it is indeed not in dispute that there were two previous suits over the same subject matter namely; land parcel number Nyandarua/Kiriita Mairo Inya Block II/3551. It is also not in dispute that in Nyahururu PMCC No. 116 of 1995, the same had been instituted by the appellant against Josphat Bachia Gitonga, John Kariuki Gitonga, Kiboi Kaguthi (sons of the 1st respondent herein) and Ngai Ndeithia Public Company Limited. The appellant in that suit had claimed for trespass against the first three defendants and further sought an order that the company be directed to issue him with requisite documents to get the title deed. The trial magistrate referred the matter to the Land Disputes Tribunal which dismissed the case on trespass and ordered that the appellant be restrained from interfering with the land. The appellant preferred an appeal against the tribunal's decision which was later struck out and as such the decision of the tribunal still stands to date.

In view of the foregoing it is our considered opinion that in light of the decision of the Land Disputes Tribunal which still stands to date which found that the appellant had no claim to the suit land, there was no basis upon which the trial court could now turn around and order the respondents to give vacant possession of the property to the appellant which the tribunal had earlier on ruled that he was not entitled to. **Section 7** of the Civil Procedure Act, 2010;

"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 the 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."

In the case of ***Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR*** a five (5) judge bench of this Court stated as follows as regards *res judicata*:

"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;

(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 learned Judges were fully aware and applied their minds to these elements when, applying this Court's decision in Uhuru Highway Development Ltd v Central Bank of Kenya [1999] eKLR they rendered the elements as;

“*(a) the former judgment or order must be* final***;***

(b) the judgment or order must be on merits;

(c) it must have been rendered by a court having jurisdiction over the subject matter and the parties; and

(d) there must be between the first and the second action identity of parties, of subject matter and cause of action.”

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 common- sensical 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 fora, 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. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.

There is no dearth of authorities surrounding this issue, and this Court has expressed itself on it endless times. In one recent decision, ***William Koross v. Hezekiah Kiptoo Komen & 4 Others [2015] eKLR***, it was stated:

> “***The philosophy behind the principle of <u>res judicata</u> is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go”.***

Speaking for the bench on the principles that underlie *res judicata*, **Y.V. Chandrachud, J** in the Indian Supreme Court case of ***Lal Chand v Radha Kishan, AIR 1977 SC 789*** stated, and we agree:

> ‘***The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.”***

The practical effect of the *res judicata* doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties –because it is the court itself that is debarred by a jurisdictional injunct, from entertaining such suit. That much was stated by this Court in **<u>Ngugi v. Kinyanjui & 3 Others</u> [1989] KLR 146** when it held (at p147) that:

> “**3.** ***Section 7 was a mandatory bar from (sic) any fresh trial of a concluded issue and a Judge cannot competently get round that bar by obtaining the consent of the parties to an arbitration of a concluded issue.”***

From the circumstances of this case it is evident that the suit was *res judicata* the same having been adjudicated upon in Nyahururu PMCC No. 116 of 1995 as to who was entitled to ownership of land parcel No. Nyandarua/ Kiriita Mairo Inya Block/II/3551 and the appellant could now not come through the back door and seek to lay a claim of the same through Nyahururu PMCC No. 173 of 1999 while the decision in Nyahururu PMCC No. 116 of 1995 still stood.

Consequently, we find no reason to fault the learned Judge’s findings that the entire proceedings in Nyahururu PMCC No. 173 of 1999 were a nullity and as such the court ought never to have heard the case or upon hearing the same ought to have dismissed it for being *res judicata*. With regard to the claim for mesne profits and the court having found that the appellant was not entitled to the land, this claim must fall by the wayside.

As to whether the learned Judge erred in law and fact in directing the Land Registrar to correct the appellant’s title for Parcel No. 419 to reflect one acre or thereabouts and not two acres, the learned Judge clearly gave his reasons for this finding and we have no basis to interfere with the learned Judge’s finding on this issue.

Accordingly, it is in view of our above conclusions that we find this appeal to be devoid of merit. It is hereby dismissed with costs to the respondents

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

<u>DEPUTY REGISTRAR</u>