



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: KOOME, MUSINGA & MURGOR, J.J.A)

CIVIL APPEAL NO. 96 OF 2017

BETWEEN

JOHNSON KINYUA GICHIGI.....APPELLANT

AND

FRANCIS MUGO KANGURE.....RESPONDENT

(Being an appeal from the Ruling of the Environment and Land Court

(Oundo, J.) dated 8th May 2017

in

Nyahururu ELC Case No. 66 of 2017 (formally NKR 230 of 2013))

JUDGMENT OF THE COURT

In this appeal, ***the appellant, Johnson Kinyua Gichigi***, is aggrieved by the ruling of the Environment and Land Court (Oundo, J.) which determined that *Nyahururu ELC Case No. 66 of 2017 (formally Nakuru Civil Suit No 230 of 2013)* was *res judicata* on account of the consent judgment entered on 16th November 2012 by the appellant and ***the respondent, Francis Mugo Kangure*** in *Nyahururu PMCC No. 108 of 2011*.

The brief background to the application giving rise to the trial court's ruling, the subject of this appeal, is that, the appellant instituted proceedings against the respondent in *Nyahururu PMCC No. 108 of 2011* claiming that, in 2008, he (the respondent) had fraudulently caused the *Land Parcel No. Laikipia/Ngobit/Supuko Block (Wiumiririe)/1367 (the subject land)* that belonged to Watetu Gachigi to be registered in his name as the proprietor; that the respondent had taken possession of the subject land thereby denying the appellant mesne profits of Kshs. 10,000 per annum. The appellant sought a declaration that he was the legal and absolute proprietor of the subject land, vacant possession, and mesne profits of Kshs 10,000 per annum.

In an amended defence and counterclaim, the respondent denied that the appellant was the registered proprietor of the subject land and stated that he was a bona fide purchaser for value of the land from one Anna Wachuka Waiganjo; that he was registered as the proprietor on 15th February 2008 and subsequently issued with a title deed; that since then he had been in possession until 14th April 2011, when his title was unlawfully cancelled by the District Land Registrar Laikipia and instead, the appellant was registered as its proprietor. The respondent sought a declaration for cancellation of the appellant's title; a declaration that he was the absolute proprietor of the subject land; and an order reinstating him as the registered proprietor.

By a sudden a turn of events, the parties entered into a consent dated 16th November 2012 which was adopted as a judgment of the court on the same day. The consent specified;

a) That the plaintiff's (main) suit against the defendant be and is hereby withdrawn.

b) That the defendant's counterclaim against the Plaintiff/ 1st defendant by counterclaim be and is hereby compromised in accordance with the terms contained in paragraph 3,4,5 and 6 below:

c) That the register of Land Parcel No. LAIKIPIA/NGOBIT/SUPUKO BLOCK 2 (WIUMIRIRIE)/1367 be and is hereby rectified in the following terms;

Entries Number 5,6 and 7

Entries Number 2,3 and 4 be reinstated

d) That a mandatory injunction be and (sic) is hereby issued compelling the plaintiff/1st defendant by counter claim together with members of his family, his proxies, licensees, employees, servants and or agents to vacate land parcel No. LAIKIPIA/NGOBIT/SUPUKO BLOCK 2 (WIUMIRIRIE)/1367.

e) That a permanent injunction be and is hereby issues restraining the Plaintiff/ 1st defendant by counter claim by himself, members of his family, his proxies, licensees, employees, servants and or agents from entering into, occupying, residing on, disposing of, alienating, committing acts of waste or in any other manner interfering with or dealing in Land Parcel No. LAIKIPIA/NGOBIT/SUPUKO BLOCK 2 (WIUMIRIRIE)/1367.

f) That costs of the main suit and of the counter claim be awarded to the Defendant/ plaintiff by counter claim and the said costs and hereby assessed at Kshs. 40,000/=."

The adoption of the consent by the trial court effectively concluded *Nyahururu PMCC No 108 of 2011*, with ownership of the subject land resting on the reinstatement of the respondent as the registered proprietor.

On 16th July 2013, the appellant filed *Nyahururu ELC Case No. 66 of 2017*, and in an amended plaint, stated that he was the legal representative of the estate of Watetu Gachigi (deceased). Once again, he claimed that the respondent had fraudulently caused the subject land to be registered in his name through a process that was fraught with illegality; he further stated that the respondent had been in possession of the subject land since 2008 therefore depriving him of mesne profits of Kshs. 10,000 per annum. He sought a declaration that the deceased's estate was the registered proprietor of the subject land, an order cancelling all the entries entered after entry no 1 on the register and in particular, entry numbers 2, 3 and 4, vacant possession and mesne profits of Kshs. 10,000 per annum, interest and costs.

Prior to the hearing, the respondent filed a Preliminary Objection by way of a Notice of Motion dated 5th September 2016 where he sought an order that the appellant's suit was *res judicata* by reason of the consent order and consequential decree in *PMCC No. 108 of 2011* and that *Nyahururu ELC Case No. 66 of 2017* be dismissed.

After considering the parties' affidavits and the submissions, the learned judge determined that the *Nyahururu ELC Case No. 66 of 2017* was *res judicata*, and in so finding, the court dismissed it with costs to the respondent.

Aggrieved by the trial court's decision, the appellant brought this appeal on grounds that the learned Judge wrongly found that the matter in issue in *PMCC No. 108 of 2011, Johnson Kinyua Gachigi vs Francis Mugo Kangure* was directly and substantially in issue in *Nyahururu ELC No. 66 of 2017*; that the parties were not the same as they did not litigate under the same title; that the Chief Magistrates' court did not have jurisdiction to determine the issues raised; that the issues in *Nyahururu ELC No. 66 of 2017* were not heard and finally determined in *PMCC No. 108 of 2011*; and that since the appellant was suing as the legal representative of Watetu Gichigi in *Nyahururu ELC No. 66 of 2017*, the matter was not *res judicata*.

Mr. Nderitu, learned counsel for the appellant, and **Mr. Kinyua Njogu**, learned counsel for the respondent, both filed written submissions which they informed the Court they would rely upon in their entirety.

The crux of the appellant's submissions was that following the adoption of the consent judgment in *PMCC No. 108 of 2011*, the respondent was declared as the registered proprietor of the subject land. It was argued that in *Nyahururu ELC No. 66 of 2017*, the appellant was claiming ownership of the subject land for the reason that it had been fraudulently transferred to the respondent whom he was suing in his capacity as legal representative of the estate of Watetu Gachigi (deceased); that *PMCC No. 108 of 2011* was solely concerned with the respondent's counterclaim and the consent specifically provided for cancellation of entry numbers 5, 6 and 7 on the register and reinstatement of entry numbers 2, 3 and 4; that the reinstated entries resulted in the respondent becoming the registered proprietor of the subject land to the detriment of the deceased's estate, and that *Nyahururu ELC Case No. 66 of 2017* was grounded on the offending entries; that by the time of filing *PMCC No. 108 of 2011* he had not been appointed as administrator of the deceased's estate, thereby lacking legal capacity and that was the reason for filing *Nyahururu ELC No. 66 of 2017*.

It was further asserted that though the consent reinstated the respondent as the registered proprietor of the subject land, the registration did not absolve him from the requirements of section 80 of the *Land Registration Act*; that consequently, the causes of action, and the persons involved in the two suits differed, and more importantly, the question of whether the deceased was the legal owner of the subject land was

not determined by a competent court with finality.

In his submissions, the respondent submitted that the learned judge rightly found that the appellant's suit was *res judicata* for the reasons that the parties and the subject land in both suits was the same; that by entering into a consent that reinstated the respondent as the registered proprietor, the appellant admitted that the respondent was the rightful owner of the subject land; that instead of prosecuting his case piece meal the appellant should have brought his whole case forward at the time of entering into consent. The case of ***Kenya Commercial Bank Limited vs Benjoh Amalgamated Limited [2017] eKLR*** was cited as recognizing the broader concepts of constructive *res judicata* which requires all issues in a dispute to be encompassed, and “...which, a party employing due diligence ought to have raised for consideration.”

In other words, it was submitted, the appellant had the opportunity to address the respondent's ownership of the subject land in relation to the estate of Watetu Gachigi in *PMCC No. 108 of 2011*, but having failed to do so, and entering into the consent instead, he was now barred by *res judicata* from re-litigating the question of the respondent's ownership of the subject land once again.

We have considered the pleadings and the parties' submissions, and are of the view that the issue for our consideration is whether in finding that *Nyahururu ELC Case No. 66 of 2017* was *res judicata*, the learned judge considered the matters that ought to have been taken into account, and by so doing arrived at the right decision that the suit was *res judicata*. In determining this issue, we are guided by the principles espoused in the established case of

Mbogo & Another vs Shah [1968] EA, p.15;

“An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”

So what is *res judicata*? In the case of ***Njue Ngai vs Ephantus Njiru Ngai & another [2016] eKLR*** this Court explained it thus;

“What is res judicata and when does it apply? The Latin of it is simply “a thing adjudicated”. But it has over time received extensive judicial interpretation in various jurisdictions of the globe which we shall not explore here. Suffice it to adopt the definition in Black's Law Dictionary, Ninth edition as:

“(i) An issue that has definitively settled by a judicial decision;

(ii) An affirmative defence barring the same parties from litigating a second lawsuit 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.”

That said, whether or not *Nyahururu ELC Case No. 66 of 2017* was *res judicata*, is matter that is to be discerned within the strictures **section 7** of the ***Civil Procedure Act, 2010***, which stipulates 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 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.”

The elements aforesaid that are necessary for a court to reach a finding of *res judicata* were aptly captured by this Court in the case of ***Uhuru Highway Development Ltd vs Central Bank of Kenya [1999] eKLR*** 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.”

When the elements are applied to this case, beginning with the parties, it is not in dispute that in both cases the appellant and the respondent were the main protagonists. Though the Lands Registrar and the Attorney General were later joined in the respondent's counterclaim, in *PMCC No. 108 of 2011*, we agree with the learned judge that a suit does not cease to be *res judicata* merely because a party has been added or another party dropped. Consequently, we can find no distinction between the parties in *PMCC No. 108 of 2011* and *Nyahururu ELC Case No. 66 of 2017*.

This brings us to the question of the cause of action. An analysis of both suits clearly discloses that the dispute concerned the ownership of

the subject land and the process of its transfer to the respondent.

In the case of Nicholas Njeru vs Attorney General & 8 Others [2013] eKLR this Court stated thus;

“This doctrine has been applied in a number of cases including; Reference No.1 of 2007, James Katabazi and 21 Others vs The Attorney General of the Republic of Uganda EACJ where the Court stated that for the doctrine to apply:

(a) the matter must be ‘directly and substantially’ in issue in the two suits,

(b) the parties must be the same or parties under whom any of them claim, litigating under the same title; and

(c) the matter must have been finally decided in the previous suit.”

In this case, the appellant has argued that, in *PMCC No. 108 of 2011*, he had sued in the capacity of the registered proprietor of the subject land, while in *Nyahururu ELC Case No. 66 of 2017*, he was suing in the capacity of a legal representative of the estate of Gatetu Gachigi (deceased), and that as a consequence the substantive suits differed; that furthermore, though he had conceded ownership of the subject land to the respondent as registered proprietor, the question of its ownership by Gatetu Gachigi (deceased) and its fraudulent transfer to the respondent by Ann Wachuka Waigango was a matter that had yet to be determined in *Nyahururu ELC Case No. 66 of 2017*.

These arguments make it clear that the appellant was attempting to prosecute the dispute he had with the respondent in a piecemeal fashion. In the first place as the registered proprietor, and thereafter as the legal representative of the deceased’s estate. But it cannot be gainsaid that what remained common to both suits was the question of who, between the appellant and the respondent, was the rightful legal owner of the subject land. The answer is to be found in the consent judgment entered in *PMCC No. 108 of 2011* which effectively declared the respondent to be the rightful owner which was by a consent of the parties. The consent expressly made provision for restoration of the title to the subject land that was initially cancelled to the respondent, following the reinstatement on the register of entry numbers 2, 3 and 4 that pertained to his ownership. This would signify that, irrespective of the allegations of fraud, the appellant had conceded ownership of the subject land to him.

Then there is the matter of the consent judgment, and whether by the dispute having been determined by consent of the parties it meant that it was not heard and determined on its merits.

Relying on the case of Kenya Commercial Bank Limited case (supra) to address the question of whether or not a case was heard on its merits when a consent judgment was entered, in the case of Julius Muthoka Ndolo vs Park Towers Limited & 2 others [2019] eKLR this Court observed that;

“Those issues cannot be re-litigated. On that point this case falls on all fours with Kamunge & Others vs Pioneer General Assurance Society Ltd [1977] EA 263 at pg. 265” where this Court stated as follows on the issue of res judicata.

“It does not matter that the judgment was by consent and not on merit after trial. It is as binding as if the judgment was one after evidence had been called.”

This Court has also stated in the case of Pop-in (Kenya) Ltd and 3 Others vs Habib Bank, A. G. Zurich C. A. No. 80 of 1988 that a matter will be res-judicata not only on points upon which the court was actually required by parties to form an opinion and pronounce a judgment but also on every point which properly belonged to the subject matter of litigation.”

To this point, of importance is that, the consent having reinstated the respondent as the registered owner of the subject land as the final position, we are satisfied that it effectively and conclusively determined the dispute with finality. There was nothing further left to be determined. And since it is not the appellant’s case that the consent was contrived through fraud, misrepresentation or duress, so as to warrant it having to be set aside. See the case of Brook Bond Liebig (T) Ltd vs Mallya [1975] EA, where the court stated what constitutes sufficient grounds for setting aside a consent. In the absence of those ingredients, a consent remained valid and binding on them more particularly since, the same parties in *Nyahururu ELC Case No. 66 of 2017* were the very parties who signed the consent.

As concerns the complaint that the lower court in *PMCC No. 108 of 2011* was not competent, since the appellant did not substantiate the allegation, we have nothing upon which to base a determination of the issue. As a consequence, we consider the claim to be unfounded.

As such, we are satisfied that the learned judge considered the matters that ought to have taken into account and in so doing reached the right decision that *Nyahururu ELC Case No. 66 of 2017* was *res judicata* so as to warrant its dismissal. Consequently, we have no reason to interfere with that decision.

For the reasons above-stated, the appeal is unmerited, and is dismissed with costs to the respondent.

It is so ordered.

Dated and delivered at Nairobi this 5th day of March, 2021.

M.K. KOOME

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

A.K MURGOR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR