Magondu v District Land Registrar Kirinyaga District & 3 others (Civil Appeal 1 of 2017) [2021] KECA 209 (KLR) (5 November 2021) (Judgment)

Neutral citation: [2021] KECA 209 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 1 OF 2017

MK KOOME, MA WARSAME & PO KIAGE, JJA

NOVEMBER 5, 2021

BETWEEN

WILLIAM NJUGUNA MAGONDU ..... APPELLANT

AND

DISTRICT LAND REGISTRAR KIRINYAGA DISTRICT ..... 1ST RESPONDENT

COUNTY GOVERNMENT OF KIRINYAGA ..... 2ND RESPONDENT

DISTRICT COMMISSIONER KIRINYAGA DISTRICT ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

(An appeal against the Judgment and order of the High Court of Kenya at Kerugoya (B.N.Olao, J.) dated 18th September 2015, and Ruling and order dated 30th September 2016 in E.L.C. No. 5 OF 2015)

JUDGMENT

1. This appeal is against a judgment by the Environment and Land Court at Kerugoya (B. N. Olao, J.) by which the court found that the appellant's petition was res judicata and struck it out with costs to the respondents and interested parties. That judgment followed a petition by the appellant seeking orders against the respondents and interested parties, inter alia, that; the action of the 2nd respondent and the interested parties in declaring Plot No. 2(77) Kagumo-kerugoya at Kagumo Market a road reserve was arbitrary, illegal, null and void and should be quashed; and an order restraining the respondents and the interested parties, their agents or servants from dealing in any way whatsoever with the said property. The appeal is also against a ruling by the same court by which the appellant's application for review of the judgment dated 18th September 2015 was dismissed with costs to the 2nd respondent and the interested parties. Interestingly, even as the appellant pursued a review of the judgment, he had also lodged a notice of appeal against that decision on the same date of the application, the 1st October

2015. That should have precluded him from seeking review by dint of Order 45 Rule 1(a) of the *Civil Procedure Rules* but the High Court nevertheless heard the application.

2. Aggrieved by the ruling of the learned Judge, the appellant filed a second notice of appeal on 13th October 2016 and subsequently lodged a memorandum of appeal hinged on 13 grounds. In summary the grounds are that the learned Judge erred by; condemning the appellant to pay costs in breach of articles 22 and 48 of the Constitution; applying the wrong legal principles and misapprehending the facts; failing to appreciate that the matters in issue in PMCC No. 34 of 1990 were not premised on violation of constitutional rights; failing to appreciate that the petition was a constitutional petition alleging violation of the rights and fundamental freedoms of the petitioner; and adjudicating issues without the benefit of the petition in the file.

3. The appeal was canvassed through written submissions, which were filed by the appellant; the 1st, 2nd, 3rd and 4th respondents, and the 2nd interested party. On the issue of costs, the appellant through the law firm of Ondieki & Ondieki Advocates while acknowledging that costs follow the event and determination of the same is a judicial discretion, contends that since the matter before the learned Judge touched on compulsory acquisition of land belonging to the appellant, it had a bearing upon the public interest and therefore the court should have exempted him from paying costs.

4. Concerning the finding that the matter was res judicata, the appellant argues that the court in Kerugoya PMCC No. 34 of 1990 and Kerugoya PMCC No. 44 OF 2010 did not conclusively determine the issues of adverse possession and compulsory acquisition of land, as it lacked jurisdiction. To support the preposition that a court's determination without jurisdiction in a matter is a nullity, the appellant cites the cases of *Sir Ali Bin Salim Vs Shariff Mohammed Sharry (1938) KLR 9* and the case of *Macfoy vs United Africa Co. Ltd [1961] 3 ALL E.R.1169 at 1172.*

5. On the question of misapprehension of facts and wrong interpretation of the law, the appellant submits that the matter has never been heard on merit and no evidence has been tested. He therefore urges this Court to depart from the learned Judge's finding, citing the case of *Selle & Another vs Associated Motor Boat Company Ltd and Others [1968] 1 EA 123* for the argument that the Court of Appeal is not bound by the trial judge's findings where he failed to take into account particular circumstances.

6. In response to the appellant, the 1st, 3rd and 4th respondents through learned counsel G. N. Muthami for the Attorney General, assert that the appellant admitted before the court below that land parcel Kerugoya Plot no. 2(77) was the subject of litigation in Kerugoya PMCC No.34 of 1990 where the matter was adjudicated upon and a consent judgment recorded by the parties. According to the 1st, 3rd and 4th respondents, since the petitioner never challenged the consent judgment, the learned Judge was right in finding that the petition was res judicata. In support of this assertion the respondents rely on the case of *Benjoh Amalgamated Limited & another vs Kenya Commercial Bank Limited [2007] eKLR*. Even after the learned judge found the petition to be res judicata, it is submitted, the court still proceeded to look at the merits of the case and found it lacking and an abuse of the court process. The 1st, 3rd and 4th respondents therefore agree with the court's order awarding costs to the respondents and the interested parties.

7. Similarly, in opposition to the appeal, the 2nd respondent through the law firm of Wakini Kiarie & Co. Advocates affirms section 27 of the *Civil Procedure Act* to the effect that costs of any suit follow the event, and urges this Court to find that the appellant has not advanced any good reason as to why this Court should depart from this principle. Further, the 2nd respondent like the rest of the respondents contends that this matter was previously litigated upon and determined, and that the appellant never appealed against those determinations, as, litigating on the same issues amounts to an abuse of the

court process. Moreover, the 2nd respondent submits, no principle of law has been demonstrated to have been misinterpreted by the learned Judge. He also faults the appellant for not complying with Rule 87(1)(h) and 87(2)(iv) of this Court's Rules by failing to attach a certified copy of the High Court decree, rendering the record of appeal defective.

8. The 2nd interested party through the law firm of Kiguru Kahigah & Co. Advocates also resists the appeal reiterating the sentiments of the respondents that the court order in kerugoya PMCC No. 34 of 2009 was never set aside and thus it remains valid and binding upon the parties. Further, in support of the respondents' submissions on the issue of costs, the 2nd interested party contends that this is not a public interest matter as claimed by the appellant, rather a personal claim in the suit property by the appellant. According to the 2nd interested party, the appellant is estopped from re-opening the same subject of litigation that had been previously adjudicated upon, based on information which he ought to have brought forward in the previous suit, but chose not to through negligence or inadvertence. The case of *Henderson vs Henderson (1843-60) ALL E.R 378* is cited in support of this submission.

9. The 2nd interested party disapproves the appellant's claim that the learned judge wrote its judgment without the petition in the file, asserting that the same was availed to the court upon the judge directing the Deputy Registrar to write to the Petitioner's advocate to avail the same.

10. This being a first appeal, it proceeds before me by way of a retrial and I am enjoined by Rule 29 (1) of the *Court of Appeal Rules* to subject the entire record to a fresh and exhaustive scrutiny and analysis before arriving at my own independent conclusions.

11. Having perused the record before me, the judgment and the ruling of the learned Judge as well as considered the submissions made by counsel and the authorities cited, it is clear that this appeal turns on two issues; whether the suit before the High Court was res judicata and whether the court was right in ordering the appellant to pay costs of the suit. The appellant challenges the court's finding that the matter was res judicata claiming that the court in Kerugoya PMCC No. 34 of 1990 and Kerugoya PMCC No. 44 of 2010 did not conclusively determine the issues of adverse possession and compulsory acquisition of land as it lacked jurisdiction. To the contrary, in the review ruling, the learned Judge quite elaborately explained why he struck out the petition for being res judicata, and advised, "if I did not apply that principle of law properly, that failure, if any, would be a point of law which can only be a good ground for appeal but not a ground for review".

Moreover, a reading of the Judgement reveals that the learned Judge addressed this claim of adverse possession and found that the appellant had no proprietary interest in the suit property. At page 15 of the judgement the court states thus;

> " In paragraph 10 of his supporting affidavit, the petitioner claims to be entitled to the suit plot by virtue of adverse possession having occupied it for 49 years. However, only the High Court can declare a person to have become entitled to land by virtue of having occupied it for over 12 years. The Petitioner does not have any orders declaring him to have become entitled to the suit land by virtue of the provisions of section 38 of the Limitations of Actions Act which grants the High Court powers to make such a declaration. The Petitioner attempted to do so by filing an originating summons in Kerugoya PMCC NO. 44 OF 2010 against the interested parties herein but this was withdrawn on 30th March 2010 no doubt after the Petitioner realized that the court had no jurisdiction over the matter. There is no evidence tendered by the Petitioner that the suit property is registered in his names under any of the legal regimes that confer interests in land".

12. I am of the same view and the appellant's assertion that the previous suits did not conclusively determine issues of adverse possession and compulsory acquisition is insupportable. As the Court stated in *Independent Electoral & Boundaries Commission Vs Maina Kiai & 5 others [2017] eKLR* (Per Makhandia, Ouko, Kiage, M'inoti & Murgor, JJ. A);

> " 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 and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice". See also, William Koross vs Hezekiah Kiptoo Komen & 4 others [2015] eKLR.

There was a sound basis for the High Court's finding on the issue of res judicata and I have no basis for overturning it.

13. Turning on the issue of costs, parties have ably cited various authorities to affirm the provisions of section 27 of the *Civil Procedure Act* to the effect that costs incidental to any suit are in the discretion of the judge, and they follow the event unless for good reason the judge directs otherwise. The appellant alleges that since his claim hinged on compulsory acquisition of land, then it was a public interest matter and he ought to have been exempted from paying costs. To the contrary and quite distinctly, this is not a public interest matter for the reason that he is seeking a personal proprietary interest in the suit property. I therefore find the appellant's objection to the order of costs to be without merit.

14. I have serious reservations whether it is permissible for the appeal to purport to be against both the Judgment dated 18th September 2015 and the Ruling dated 30th September 2016. It could indeed be incompetent on that account, but I shall say no more on it having addressed the appeal against the Ruling on a substantive merit basis.

15. Ultimately my conclusion is that this appeal is without merit and should fail in entirety. I would accordingly dismiss it with costs. As Warsame JA agrees, it is so ordered.

16. This Judgment is delivered pursuant to Rule 32(3) Koome JA having ceased being a judge of the Court upon assuming Office of Chief Justice.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021.

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

CONCURRING JUDGMENT OF WARSAME, JA

I have had the advantage of reading in draft the judgment of Kiage, JA. and have nothing useful to add.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021.

M. WARSAME

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JUDGE OF APPEAL