**Ogaro v Naset & another (Civil Appeal 135 of 2018)**
**[2021] KECA 212 (KLR) (5 November 2021) (Judgment)**

Neutral citation: [2021] KECA 212 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT KISUMU**

**CIVIL APPEAL 135 OF 2018**

**HA OMONDI, S OLE KANTAI & M NGUGI, JJA**

**NOVEMBER 5, 2021**

**BETWEEN**

**HENRY MOCHOGE OGARO ..... APPELLANT**

**AND**

**BARNABAS MAJIMBO NASET ..... 1ST RESPONDENT**

**JOSEPH NAFULA ..... 2ND RESPONDENT**

***(An appeal from the judgment and decree of the Environment and Land Court in Kitale (Mwangi Njoroge, J) dated 20th December, 2017 in ELC Case No. 64 of 2006)***

## JUDGMENT

1. The present appeal arises out of the decision of the Environment and Land Court (ELC) sitting in Kitale pertaining to ownership of a plot of land measuring 50ft x 100ft being part of Namanjalala Farm L.R. No. 2048. In its decision dated 20th December 2017, the trial court found that the appellant's claim against the 1st respondent was res judicata and dismissed his suit.

2. Aggrieved by the decision of the trial court, the appellant has filed the present appeal in which he raises five grounds of appeal in his Memorandum of Appeal dated 22nd October 2018. In his first ground, he argues that the court erred in law in finding that his claim was res judicata. Secondly, that the court erred in not holding that he was deprived of his property by the Kwanza Land Disputes Tribunal, and thirdly, that the court erred in not holding that he was not a party to the proceedings before the Tribunal and adverse orders were made against him. It is his contention in his fourth ground that the court erred in not finding that the fact that the Land Disputes Tribunal award could be challenged in judicial review proceedings did not bar a suit challenging the award. It is his contention, finally, that the court erred in not finding that the 1st respondent did not have a sale agreement with the 2nd respondent.

3. Before considering the judgment of the trial court against the appellant's grounds of appeal, it is useful to set out briefly the parties' respective cases before it.

4. In the plaint dated 29th April 2006, the appellant had sought two declaratory orders. The first was that he was the lawful owner and is entitled to possession, occupation and use of a property measuring 50ft x 100ft being part of Namanjalala Farm L.R. No. 2048. The second declaratory order sought was that the Tribunal award and decree in Kitale SPMCC Land Case No. 63 of 2000, in so far as it affects the suit property, was unlawful, bad in law and a nullity and was based on breach of the rules of natural justice and ought to be set aside. The appellant also sought the costs of the suit.

5. The appellant alleged before the trial court that sometime in 1992, he had bought the suit property from the 2nd respondent and had carried out substantial developments on it with the knowledge and in full view of the respondents. In 2000, the 1st respondent had sued the 2nd respondent before the Kwanza Land Disputes Tribunal. An award which was made in favour of the 1st respondent was filed in court in Kitale SPMCC Land Case No. 63 of 2000. In the award, the 1st respondent was awarded two plots out of Namanjalala Farm, and the 2nd respondent and others were ordered to leave the plots awarded to the 1st respondent. The Land Disputes Tribunal award was adopted as an order of the court.

6. The appellant contended before the trial court that he was not a party to the Kwanza Land Disputes Tribunal matter nor was he notified of the proceedings in order to respond. It was his contention that the Tribunal award was bad in law as he was not given a hearing before the adverse orders were made against him; that the 1st respondent wished to evict him from the property as he fell within the description of 'others' in the order; and that he is the lawful owner of the suit property and any purported sale to the 1st respondent was unlawful as the property had already been sold to him.

7. In his defence dated 19th June 2000, the 1st respondent, who was the 1st defendant in the suit before the trial court, denied the appellant's claim. He averred that it was not necessary to inform the appellant of the Land Disputes Tribunal proceedings as the Tribunal visited the suit property. If the appellant was in possession of the property as he alleged, he was at liberty to attend the proceedings.The 1st respondent's case was that the proceedings in SPMCC No. 63 of 2000 were lawful and regular and have never been set aside on appeal or judicial review.

8. The 1st respondent argued further that the appellant had participated in Kitale SPMCC No. 63 of 2000 by filing an application for review of the judgment, an application that was dismissed on 24th August 2004. The appellant had appealed in HCCA No. 10 of 2004 against the dismissal, an appeal that was dismissed on 24th April 2006 for lack of merit. Accordingly, that the appellant's suit before the trial court was an abuse of the court process.

9. With regard to the merits of the case, the 1st respondent contended that he had purchased the suit property in 1979 from the 2nd respondent. He had been in possession until 1992 when he was forced to flee due to tribal clashes. He had returned in 1994 to find strangers on the property. If there was a sale between the 2nd respondent and the appellant in 1992, then such sale was null and void.

10. Regarding the award by the Land Disputes Tribunal, it was the 1st respondent's case that the appellant was aware of the proceedings but took no steps to protect his interests. Further, that the judgment in SPMCC Land Case No. 63 of 2000 was never set aside. The application to review it was dismissed, as was the appeal against the dismissal. It was the 1st respondent's case therefore that the suit by the appellant before the trial court was res judicata and was intended to prevent the 1st respondent from enjoying the fruits of the judgment in SPMCC Land Case No. 63 of 2000.

11. In his defence dated 23rd June 2006, the 2nd defendant admitted the appellant's claim that he sold the suit land to him in 1992. He denied having sold any portion of the suit property to the 1st respondent. He alleged a conspiracy between the 1st respondent and the Land Disputes Tribunal to deprive him of the suit property.

12. In its decision and having analysed the respective claims of the parties, the trial court considered the question whether the appellant's suit was res judicata. It noted that there was an award before the Land Disputes Tribunal which was made an order of the court in SPMCC Land Case No. 63 of 2000. The order was not appealed from and no judicial review proceedings were taken to set aside the order of the Senior Principal Magistrate's Court adopting the award of the Land Disputes Tribunal. Judicial Review proceedings were also not taken to quash the judgment.

13. Regarding the parties involved in the matter, the trial court took the view that the decision of the Land Disputes Tribunal involved the 1st and 2nd respondents. The 2nd respondent had participated in the proceedings. The record of proceedings before the Tribunal placed before the trial court showed the participation of the 2nd respondent. He had also conceded that there was a sale between him and the 1st respondent.

14. The trial court found that the parties in SPMCC Land Case No. 63 of 2000 were the same as the parties in the appeal from the matter, the present appellant being the appellant from the SPMCC Land case.

15. In concluding that there was no new issue to be determined in the matter before it, the trial court found that the issue whether the present appellant, the plaintiff before the court, was not given a hearing contrary to the rules of natural justice was at issue in the appeal before the High Court in HCCC No. 10 of 2004. The inclusion of a declaratory order in the suit before the trial court could not therefore redeem the appellant's suit from being found to be res judicata. The appellant, having been claiming under the purported agreement with the 2nd respondent, had his interests represented by the 2nd respondent. The court accordingly found that the suit was res judicata.

16. The parties hereto filed written submissions in support of their respective cases. In his submissions dated 27th April 2020, the appellant maintains his contention that the trial court erred in finding that his suit was res judicata. He contends that he was not a party to the dispute before the Land Disputes Tribunal and the subsequent award; he had applied for review of the decision and his appeal had been dismissed for lack of jurisdiction and not on merit; that he had filed an appeal against the decision which appeal was dismissed without delving into the merits. It is his submission that the cases that dealt with the subject matter of the suits, namely Kitale Land Case No. 63 of 2000, Kitale High Court Civil Appeal No. 10 of 2004 and Kitale Appl. No. 92 of 2000, which was dismissed for want of prosecution, did not meet the ingredients necessary for the doctrine of res judicata to apply.

17. In his submissions dated 31st May 2020, the 2nd respondent raises three issues for determination. The first and third, which are not germane to the issues that arise in this appeal, relate to the question whether the award of the Tribunal adopted in SPMCC No. 63 of 2000 were lawful and the options open to the appellant once the award of the Tribunal was adopted by the court in SPMCC Land Case No. 63 of 2000.

18. The 2nd respondent submitted that the Tribunal lacked jurisdiction to hear and determine the dispute in question as the dispute concerned ownership. In his view, the provisions of section 3(1) of the *Land Dispute Tribunal Act Cap 303A* Laws of Kenya were not adhered to. He submitted, further, that the Tribunal was improperly constituted since it had four instead of three members as envisaged under section 4(2) of the said Act. In his view, the trial court was wrong in agreeing with the 1st appellant that the appellant's case was res judicata, and the appellant's only recourse was to file the suit against the

1st respondent. It was also the 2nd respondent's submission that the only option open to the appellant was to file a declaratory suit against the 1st respondent as the options of judicial review and appeal were not available.

19. With respect to the issue of whether the appellant's suit was res judicata, the 2nd respondent supports the appellant's contention that the suits that dealt with the issues pertaining to the subject property did not determine the issues on the merits. Accordingly, the only recourse open to the appellant was to file the declaratory suit that was before the trial court.

20. In his submissions in opposition to the appeal, the 1st respondent submits that the trial court was correct in its findings. The appellant was claiming under the 2nd respondent and could therefore not dissociate himself from the litigation in which the 2nd respondent had participated. Regarding the appellant's claim that he had been deprived of his parcel of land by the Land Disputes Tribunal, the 1st respondent submits that the appellant did not have a title nor a share certificate to the suit land. The suit land had already been sold and transferred to the 1st respondent and a share certificate was issued to him by the company owning the farm.

21. We have considered the record of the trial court, the pleadings of the parties in the matter and the respective submissions of the parties before us. The sole issue for determination is whether the trial court was correct in its finding that the suit before it was res judicata.

22. Section 7 of the *Civil Procedure Act* provides as follows with respect to the principle of res judicata:

> " 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."

23. The principle has been the subject of elucidation in several decisions of our courts. In its decision in *Njue Ngai vs Ephantus Njiru Ngai & another [2016] eKLR* this Court explained res judicata as follows:

> "
>
> " 13. What is res judicata and when does it apply? The Latin of it is simply "a thing adjudicated". But it has overtime received extensive judicial interpretation in various jurisdictions of the globe which we shall not be tempted to explore here. Suffice it to adopt the definition in Black's Law Dictionary, Ninth edition, as:
>
> "(i)An issue that has been definitively settled by 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."

24. Similarly, in *Alka Roshanlal Harbanslal Sharma & another v Theresa Constabir [2020] eKLR* the court stated that:

> " 18. Similarly, this Court has severally held that res judicata is not confined to issues which a court was actually asked to decide upon, it also covers issues or facts which are clearly part of the subject matter of the litigation and therefore could

have been raised in earlier proceedings between the parties, and would be an abuse of the court process to allow new proceedings to be commenced."

25. Finally, in *Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR* it was held that:

> " 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."

26. Applying the above principles to the facts of the present case, we note that the appellant impugns the decision of the trial court and submits that it does not satisfy all the mandatory elements and ingredients necessary for the doctrine of res judicata to apply. It is not in dispute, however, that the dispute pertaining to the ownership of the suit property was the subject of litigation before the Kwanza Land Disputes Tribunal. That dispute involved the 1st respondent and the 2nd respondent, whom the appellant alleges had sold the suit property to him. An award was made by the Tribunal in favour of the 1st respondent. The 2nd respondent filed an appeal against the award, being Kitale Appl. No. 92 of 2000, which was dismissed for want of prosecution. The appellant had also filed High Court Civil Appeal No. 10 of 2004 in respect of the same matter which was heard on its merits and dismissed.

27. We observe that in its judgment, the trial court noted that the dispute at the Land Disputes Tribunal was between the 1st and 2nd respondents. Both the respondents conceded before the trial court that the Tribunal visited the suit land on 30th March 2000. The 2nd respondent participated in the proceedings of the Tribunal and questioned the 1st respondent, as the record of the proceedings shows. It was also the court's finding that the parties in the case before the Magistrate's Court, SPMCC Land Case No. 63 of 2000, were the same. The present appellant was the appellant in the appeal before the High Court.

28. The trial court also considered the issues that had been raised in the prior cases pertaining to the suit property. As the trial court found, one of the issues raised in the appellant's appeal before the High Court was whether the "learned Trial Magistrate erred in law and in fact in failing to find that the appellant was not given a hearing, contrary to the principles of natural justice before he was deprived of his property..." This issue was also at the core of the appellant's case before the trial court, the appellant having sought a declaration that the decision of the Land Disputes Tribunal adopted by the Magistrate's Court in SPMCC No. 63 of 2000 was arrived at in breach of the rules of natural justice.

29. We fully agree with the findings of the trial court that the suit before it was res judicata. It raised the same issues that had been before the Land Disputes Tribunal. The parties in the suit were the same, with the appellant in this matter claiming under the 2nd respondent. The award of the Tribunal was made an order of the Court in SPMCC Land Case No. 63 of 2000. An appeal by the appellant-HCCA No. 10 of 2004 was heard and dismissed. Kitale Appl. No. 92 of 2000 filed by the 2nd respondent against

the decision in SPMCC No. 63 of 2000 was dismissed for want of prosecution. For the appellant to file yet another suit, disguised as one seeking declaratory orders with respect to the same subject matter as was the subject of the prior litigations was to engage in an abuse of the court process.

30. In the circumstances, it is our finding and we so hold that the present appeal is devoid of merit. It is hereby dismissed with costs to the 1st respondent.

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

**S. ole KANTAI**

**.....**

**JUDGE OF APPEAL**

**H. A. OMONDI**

**.....**

**JUDGE OF APPEAL**

**MUMBI-NGUGI**

**.....**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**