IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, JJ.A)

CIVIL APPEAL NO. 24 OF 2018

BETWEEN

MAXWEL GEORGE MURUNGARO MBUGUA ....APPELLANT

AND

HON. ATTORNEY GENERAL ....RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Kakamega, (C. Kariuki, J.) *dated 22nd September, 2016* in **HC Misc. Case No. 20 of 2016)**

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JUDGMENT OF ASIKE-MAKHANDIA, JA

This is an appeal from a ruling of the High Court at Kakamega, (C. Kariuki, J.) dated 22nd September, 2016 in which the appellant's application seeking compensation from the respondent was dismissed.

The brief facts leading to the present appeal are as follows; the appellant filed a motion on notice in the aforesaid High Court pursuant to Order 40 Rules 1, 2 & 9 of the Civil Procedure Rules and Sections 1A, 3, 3A and 63C of the Civil Procedure Act seeking compensation from the respondent herein. It was his case that he was a victim of post-election violence (2007-2008) during which his property was damaged. He had also been registered as an internally displaced person (IDP) and given Kshs. 10,000 for upkeep. However, to assist in prosecuting this application, the appellant took a loan of Kshs. 50,000/- from Mega Micro-Finance Company.

The state responded through a replying affidavit sworn on 20th June, 2016 by Gilbert C. Tarus, learned state counsel. He deposed that the application was res judicata as a similar application had been heard, determined and a final decision rendered thereon in Kakamega High Court Constitutional Reference No. 8 of 2013, hereinafter "the reference". That the facts, parties and reliefs sought by the appellant in the application were similar to those sought in the reference. It had also been held in the reference that the issue therein was also res judicata as a similar issue had earlier on been canvassed and determined in another case being in Kakamega HCCC No. 160 of 2010 which involved the same parties. That the appellant was therefore abusing the court process by making claims already heard and determined.

The learned Judge (Kariuki, J.) in considering the issue of res judicata relied on the decision in **E.T v Attorney General & Another [2012] eKLR** and Section 7 of the Civil Procedure Act. He held that it was clear that the issues raised in reference, Kakamega HCCC No. 160 of 2010, Kisumu CACA No. 46 of 2015 and those raised before him in the application were similar. Accordingly, he proceeded to dismiss the application for being res judicata.

The appellant was aggrieved by that ruling and order. He therefore lodged the present appeal in which seven (7) grounds were raised to wit that the learned Judge erred in; misdirecting himself by failing to consider that the appellant was an IDP, a layman and a pauper who could not afford services of counsel; not appreciating that the appellant's constitutional rights had been violated and his property damaged leaving him homeless; failing to consider that the appellant was an aggrieved victim seeking compensation for loss and damage suffered; failing to consider that the appellant was never served with the replying affidavit filed in the High Court; failing to consider Article 22 of the Bill of Rights, constitutional law, real or documentary evidence, the Victim Protection Act, IDPs Act and Land Act; failing to consider that the appellant had never instituted any other court proceedings claiming the same relief; and failing to appreciate that the appellant had a prima facie case with a probability of success and was bound to suffer harm which could not be compensated and finally that the balance of convenience was in his favour.

When the appeal came up for hearing, the appellant was present in person. There was no appearance by the respondent though served. The appellant urged us to develop the law in accordance with Article 20 of the Constitution. He relied on his written submissions in urging that

he was seeking justice to compel the respondent to compensate him for his property that was destroyed during post-election violence amounting to Kshs. 2,010,000. He urged us to consider that the respondent had on numerous occasions failed to respond to his pleadings and appear in court.

I have considered the record of appeal, submissions by the appellant and the law. I note that the appellant has not raised or addressed the issue of res judicata in his grounds of appeal and submissions. However, I cannot turn a blind eye on the same as it was the main ground upon which the appellant's application before the High Court was dismissed.

The essentials of the doctrine of res judicata are set out in Section 7 of the Civil Procedure Act and were also extensively discussed by this Court in the case of **William Koross v Hezekiah Kiptoo Komen & 4 Others** **[2015] eKLR** as follows:

> **"The philosophy behind the principle of res judicata 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…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 injunction, from entertaining such suit."**

See also **E.T. vs. Attorney General & Another [2012] eKLR**

Section 7 of the Civil Procedure Act provides that; "n**o 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 can 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". Therefore,** for the doctrine of Res judicata to apply the following elements must be satisfied: the suit or issue was directly and substantially in issue in the former suit; the former suit was between the same parties or parties under whom they or any of them claim; the parties were litigating under the same title; the issue was heard and finally determined in the former suit; and the court that previously heard and determined the issue was competent to try the suit or the suit in which the issue is raised.

It is common ground that the appellant filed in the High Court at Kakamega the reference, HCCC No. 160 of 2010 and Kakamega HC Misc. Case No. 20 of 2016 all of which were dismissed with the latter two being dismissed for being res judicata. The High court made a specific finding that the issues raised in those earlier suits and determined were the same issues being raised by the appellant in the application before it. That the parties were the same and that the courts which entertained the dispute were competent to hear the dispute. I am satisfied that the learned judge was right in finding as he did that the application before him was res judicata given all the above circumstances. I find no reason to interfere with the exercise of discretion by the High Court in that regard in dismissing the same. (See: **Mbogo and Another v Shah** **[1968] EA 93). In any event and as already stated the appellant did not submit at all on the question of res judicata.**

The upshot then is that the appeal lacks merit and is hereby dismissed with no order as to costs.

This Judgment is delivered pursuant to rule 32 (3) of the court of appeal rules since Odek, J.A passed on before the Judgment could be delivered. As Kiage J.A concurs, orders accordingly.

Dated and delivered at Kisumu this 31st day of January, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.

JUDGMENT OF KIAGE, J.A

I have had the benefit of reading the Judgment of the learned Makhandia, JA in draft and do agree with his analysis and conclusions on this appeal.

It is never easy to let go, especially when one feels a deep sense of grievance and believes strongly that his rights have been violated and the harm suffered is deserving of compensation, redress or other relief by application of law.

To go down the path of litigation must, however, be accompanied by a reality-check that one may not always get the result they hoped for. The court may decide a matter in a way that shatters hopes and perhaps opens up new avenues for complaint. The structured manner for dealing with such an eventuality is to appeal to a higher court, where allowed, but even that ascending path does come to an end, eventually.

So it is that, for good reason and out of the philosophy we espoused in ***WILLIAM KOROSS vs. HEZEKIAH KIPTOO KOMEN & 4 OTHERS*** ***[2015] eKLR*** which my brother has cited in his judgment, and with which I agree as firmly as when we decided that case, the law

expressly and peremptorily prohibits a court, all courts, from taking up issues or disputes already heard and determined by a courts of competent jurisdiction where such issue or dispute was before such court between the same parties or those claiming under them. See section 7 of the Civil Procedure Act. It is a crucial jurisdictional question.

Difficult and unpleasant as it may be to the appellant, the undisputable reality is that he had litigated the matter that C. Kariuki, J. dismissed. He had tried it at least twice before and so really never could approach the High Court at Kakamega, or any other court in the Republic one more time, without being turned away, of a certainty, for the reason that the matter was already decided. It was *res judicata.*

I agree that the learned judge was right to dismiss the appellant's suit. He really had no choice in the matter. Accordingly, the appellant's complaint before us must necessarily fail, and I, like Makandhia, JA, would dismiss the appeal with no order as to costs.

Dated and delivered at Kisumu this 31st day of January, 2020.

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR