



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, KIAGE & OTIENO-ODEK, JJA)

**CIVIL APPEAL NO. 94 OF 2017**

**BETWEEN**

**ESTHER ANGONG'A NGICHO.....APPELLANT**

**AND**

**ISDORA OPIYO YOGO.RESPONDENT.....APPELLANT**

(Being an appeal from the judgment and decree of the High Court of Kenya at Kisumu (Abida A. Aroni J.) delivered on 14<sup>th</sup> July 2011 in *ELC No. 900 of 2015 formerly Kisumu HCCC No. 236 of 2002*)

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**JUDGMENT OF ASIKE-MAKHANDIA, J.A**

Before this Court an application to strike out the notice and record of appeal was argued. The substantive appeal was also argued. At the outset, I wish to point out the pleadings before this Court in the application to strike out was not succinctly crafted and drafted as confusion arises as which party is the applicant or appellant/respondent in the matter.

By a Notice of Motion dated 21<sup>st</sup> September 2017, the respondent (Isdora Opiyo Yogo) moved this Court for an order to strike out the notice and record of appeal filed in the matter. In the same application, the respondent sought for an order to strike out the certificate of delay issued in this matter asserting that the said certificate is fraudulent and was obtained by concealment of material facts.

The grounds in support of the Motion are that the notice of appeal is defective and does not comply with the law; that the record of appeal contains new documents that were not produced during the hearing of the suit before the trial court; that the appeal was filed inordinately late after a delay of six years; that the record of appeal was filed out of time without leave and that the certificate of delay filed in this matter is fraudulent and was obtained by concealment of material facts. The Motion is supported by an affidavit deposed by the respondent.

In the supporting affidavit, it is deposed that the impugned judgment was delivered on 14<sup>th</sup> July 2011 and the appeal had to be filed by 28<sup>th</sup> July 2011; that the Notice of Appeal was filed on 1<sup>st</sup> August 2011 when time had expired; that the notice was not served within seven days as prescribed under the rules of this Court; that the notice was served on 9<sup>th</sup> August 2011 after expiry of the prescribed seven day period; that the typed proceedings were ready for collection on 28<sup>th</sup> October 2011; that copies of the typed proceedings was ready by 17<sup>th</sup> January 2012; that the certificate of delay was obtained by concealment of the fact that the typed proceedings were ready for collection on 28<sup>th</sup> October 2011 and in any event by 17<sup>th</sup> January 2012; that the appellant did not exercise due diligence to collect the proceedings; that the appellant had filed an application for stay of execution of the judgment of court on 20<sup>th</sup> February 2014 and at no time did she mention she had not received typed proceedings; that the certificate of delay issued in this matter is an afterthought and was obtained by fraud; that the instant appeal is defective having been filed way out of time.

The appellant herein by way of a replying affidavit is opposing the application to strike out the notice and record of appeal. Counsel submitted that the notice of appeal was filed on 1<sup>st</sup> August 2011 and served on 9<sup>th</sup> August 2011; that the instant application to strike out the notice and record of appeal has been filed way out of time; that under **Rule 84 of the Rules of this Court**, an application to strike out a notice of appeal should be made within 30 days of service of the notice; that in the instant case, the notice was served on 9<sup>th</sup> August 2011 and the 30-day period lapsed on 9<sup>th</sup> October 2011; and that the present application has

been filed six years after delivery of the impugned judgment and no application has been made for extension of time to file the application.

However, the appellant conceded that the notice of appeal was filed three days late and served one day late; it was urged there is nothing misleading in the certificate of delay filed in this matter.

I have considered the application to strike out the notice and record of appeal and the grounds in support and opposition thereto. **Rule 84** of the Rules of this Court provides that: -

“A person affected by an appeal may at any time either before or after institution of the appeal apply to the Court to strike out the Notice of Appeal or the appeal, as the case may be on the ground that no appeal lies or that some essential step in proceedings has not been taken or has not been taken within the prescribed time. Provided that an application to strike out a Notice of Appeal or appeal shall not be brought after the expiry of 30 days from the date of service of the Notice of Appeal or Record of Appeal as the case may be.” (Emphasis supplied)

In the instant matter, the application to strike out the notice and record of appeal was filed on 21<sup>st</sup> September 2017. The notice of appeal was served on 9<sup>th</sup> August 2011. The period between service of the notice of appeal and the filing of the instant application is six years. The *proviso to Rule 84* of the Rules of this Court stipulates that an application to strike out a notice or record of appeal must be filed within 30 days of service. In the instant matter, I am satisfied that the application to strike out has been filed beyond the 30 days stipulated in the proviso to rule 84 of the Rules of this Court. The application was filed six years after the notice of appeal was served. I thus find the Notice of Motion dated 21st September 2017 has no merit. I dismiss the Motion with costs.

I now turn to consider the merits of the substantive appeal in this matter. The suit properties in dispute in this appeal are Land Parcel Nos. Kagan/Komenya/457 and Kagan/Komenya/458.

By an originating summons dated 18<sup>th</sup> July 2002, the respondent moved the court below seeking *inter alia* a declaration that Land Parcel Kagan/ Komenya/457 belongs to her and Land Parcel Kagan/Komenya/458 should only have the appellant’s homestead. It was further alleged that the respondent had lived on the suit property for over 45 years and had acquired title thereto by way of adverse possession.

The dispute over the suit properties was commenced way back in 1964 before the Homa-Bay Township African Court in the name of the respective deceased husbands of the appellant and respondent herein. The dispute started with Homa-Bay Township African Court Land Case No. 19 of 1964. An appeal was lodged against the decision of the African Court in the District Magistrate being Appeal No. 71 of 1964 and the appeal was allowed. A review was applied for in Review Case No. 64 of 1964 and the same was declined. The boundary between the two parcels of land as demarcated by the District Court in Appeal No. 71 of 1964 was confirmed. It is significant to take into account that no appeal was lodged against the decision made in 1964 by the District Magistrate’s Court in Land Case No. 71 of 1964.

Not satisfied with dismissal of the review case, Land Case No. 11 in relation to Plot No. 457 was filed before the Komenya Arbitration Board. The review decision was set aside. An appeal was filed in Land Appeal Case No. 113 of 1993 in relation to Parcel No. 457. The decision in Land Case No. 11 was set aside.

Despite the decision made in 1964 by the District Magistrate’s Court more particularly in relation to the demarcation of the boundary between the two parcels of land, the respondent (Isdora Opiyo Yogo) filed a new suit at the High Court by way of an Originating Summons dated 18<sup>th</sup> July 2002 as further re-amended on 3<sup>rd</sup> June 2009. The respondent sought an order that she had acquired the suit property by way of adverse possession having lived thereon for over 45 years.

Upon hearing the parties to the Originating Summons, the learned judge in a judgment delivered on 14<sup>th</sup> July 2011 expressed as follows:

All in all, I am therefore of the view that the decision of the District Court No. 71 of 1964 and affirmed by the Review Court...is the lawful and correct position.

The boundaries between the parties are as set by the District Court.

On the doctrine of adverse possession, it is obvious the parties have had cases since 1964 to date and the doctrine of adverse possession cannot therefore applicable herein (sic).

The judgment of the court in summary is as follows:

1. The doctrine of adverse possession is not applicable.

2. I herein declare that the land allocated to Esther Ngicho's husband Ngicho Okwany and Isdora Yogo's husband Simon Yogo are as outlined and demarcated by District Magistrate's Court Case No. 71 of 1964.

3. I direct the relevant lands office to rectify the registers of LR No. 457 & 458 in line with the decision of District Magistrate Case No. 71 of 1964.

4. Costs to the applicant.

Aggrieved by the judgment of the court, the appellant has lodged the instant appeal citing the following grounds in the memorandum:

- i. That the judge erred in law in expressing herself on matters which were not before her and could not have been before her for determination.
- ii. The judge erred in making an award of costs against the appellant who was the successful party without assigning reasons for such a directive.

The appellant prays that the appeal be allowed and that the judgment of the learned judge beyond the finding that the doctrine of adverse possession is inapplicable be set aside and in its place an order be made dismissing the respondent's suit before the trial court with costs to the appellant.

At the hearing of this appeal, learned counsel Mr. David Otieno appeared for the appellant while learned counsel Mr. James Mwamu appeared for the respondent. Both parties filed written submissions and lists of authorities in the matter.

Counsel for the appellant rehearsed the background facts leading to the dispute between the parties. It was submitted that indeed the dispute over the suit properties started well back in 1964; that the claim in the Originating Summons was founded on adverse possession; that the learned judge having rejected the claim for adverse possession should have downed her tools; that the judge had no power to make any other orders beyond rejecting the claim for adverse possession; that the additional directions which the judge gave after rejecting the claim for adverse possession were *obiter dicta*; that the judge went beyond the decision in Homa Bay District Magistrate's Court Case No. 74 of 1964 and purported to issue directions for the execution of that decision; that in giving the said directions, the learned judge was wrong to the extent that a decision can only be executed and implemented by the court that made the decision and not a superior court; that the learned judge in giving directions erred in trying to act on a judgment delivered after 12 years; that there is a 12-year limitation period for execution of a judgment of the court; and that the judge having found that *res judicata* applied in this matter, the judge could only deal with the issue of adverse possession and nothing more.

The appellant further submitted that the judge in giving directions on how to implement the District Magistrate's Court order of 1964 erred in law as the court dealt with matters not pleaded before it. Finally, on the issue of costs, the appellant submitted the judge erred in awarding costs to the respondent because it was the appellant who was the successful party before the court; that the suit was for adverse possession and the claim was dismissed; the judge also found *res judicata* applied; that despite these findings, it is surprising the judge erred and condemned the appellant to pay costs and that no reason was given for awarding costs to the losing party.

In concluding his submissions, the appellant submitted that there is another suit pending in Kisii being HCCC No. 328 of 1998 over the suit property Land Parcel No. 457. Counsel urged this Court to take into account that the proceedings before the Kisii High Court relate to execution and implementation of the District Magistrate's Court decision of 1964.

The respondent in opposing the appeal rehearsed the background facts to the dispute between the parties stemming from 1964. It was submitted that it was incorrect to state that the dispute before the learned judge related only to adverse possession. Counsel submitted that in the further amended Originating Summons dated 3<sup>rd</sup> June 2009, there were additional prayers that required the learned judge to determine. For instance, the respondent prayed for a declaratory order that as at 1964, the suit land had not been allocated any parcel number and the District Court awarded the whole suit land to the appellant. Appeal No. 71 of 1964 had ordered the respondent to take the homestead and not the entire suit property. Counsel submitted that due to the additional prayers in the re-amended Originating Summons, the learned judge was moved to pronounce on the decision in Appeal Case No. 71 of 1964 which ordered the respondent to take the homestead. Citing the case of **Mubia – v- Odd Jobs, (1974) E.A. 476** counsel submitted that a court can make a decision on an un-pleaded issue if the parties have raised it and left it for the court's determination. Counsel submitted that the matter having been extensively litigated in various courts the issue before the judge was simple, namely to declare that the land allocated to the parties was as demarcated by the District Magistrate's Court Case No. 71 of 1964; that the claim for adverse possession did not in any way prejudice the respondent in so far as the 1964 decision is concerned; that the respondent should have objected to the amendments in the Originating Summons that included a prayer for implementation of the of the judgment of the magistrate's court; that if inclusion of the prayer for implementation was wrong, the same can be cured by **Article 159 of the Constitution** which mandates

courts to do substantive justice rather than be guided by procedural technicalities. (See **Mircrosoft Corporation – v- Mitsumu Computer Garage Limited & another Nairobi Milimani HCCC NO. 810 of 2001 [2001] KLR 470**).

Counsel further submitted that the judge was right to address the other issues before the court and could not be restricted to determining the issue of adverse possession only and that in any case, the appellant had responded to the issues raised and was not prejudiced in any way.

On costs, the respondent submitted the learned judge did not err as the respondent had succeeded in one limb of the prayers namely the prayer for a declaration that the land allocated to the parties is as per the demarcation by the

District Magistrate Court Case No. 71 of 1964; the respondent also succeeded in the order directing the relevant lands office to rectify the registers of LR No. 457 & 458 in line with the decision of the District Magistrates Case No. 71 of 1964. Based on the foregoing submissions, the respondent urged us to dismiss this appeal.

I have considered the grounds of appeal as well as submissions by counsel and the authorities cited. This is a first appeal and it is my duty to analyze and re-assess the evidence on record and reach my own conclusions. In **Selle - vs- Associated Motor Boat Co. [1968] EA 123**, it was expressed:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (**Abdul Hameed Saif -v - Ali Mohamed Sholan (1955), 22 E. A. C. A. 270**).”

The main ground of appeal is that the judge having rejected the respondent’s claim for adverse possession, the court had no jurisdiction to determine anything else except costs. Another pivotal ground is that the judge erred in law in awarding costs to the respondent who was the losing party.

In support of the appeal, it was submitted that the learned judge correctly made a finding that the respondent’s claim founded on adverse possession had no merit; that the judge correctly found that the dispute between the parties had been determined in 1964 in District Magistrate’s Appeal No. 71 of 1964; and that having made the determination, the judge had no jurisdiction to interpret, implement or give directions on how to implement the judgment of the District Magistrate’s Court delivered in 1964. There has never been an appeal against the decision of the District Magistrate’s Court delivered in 1964 and the judge correctly held the dispute between the parties had been determined in 1964. To this extent, the appellant submitted that the doctrine of *res judicata* is applicable in this case and the litigation between the parties must come to an end. On the issue of costs, the appellant urged that the judge erred in awarding costs to the respondent who was the losing party before the court.

In opposing the appeal, the respondent submitted that the learned judge did not err in awarding costs because the Originating Summons was partially successful. It was further submitted that judge did not err in giving directions on how to implement the 1964 judgment of the District Magistrate’s Court because a prayer for direction had been made and pleaded in the re-amended Originating Motion. Having made a prayer for directions, the court was duty bound to pronounce itself on the matter.

I have considered the rival submissions by the parties in this appeal and the authorities cited. I have also analyzed the record of appeal and the judgment of the court below. A pivotal issue in this appeal is the application of the doctrine of *res judicata*.

The law on *res judicata* in civil law is found at **Section 7 of the Civil Procedure Act** which provides as follows;

“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 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.”

For *res judicata* to be invoked in a civil matter, the issue in a current suit must have been previously decided by a competent court. Secondly, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in a subsequent suit where the doctrine is pleaded as a bar. Thirdly, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title.

(See the case of **Karia and Another – v- the Attorney General and Others (2005) 1EA 83**. **Richard Kuloba** in his book, **Judicial Hints on Civil Procedure, 2<sup>nd</sup> Ed** writes as follows;

“The plea of res judicata applies not only to points upon which the first Court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. The subject matter in the subsequent suit must be covered by the previous suit, for res judicata to apply: Law Ag V-P in Kamunye and others vs Pioneer General Assurance Society Ltd [1971] EA 263 at 265, (20 October 1970), on appeal from High Court of Uganda but relying on JadvaKarsan vs Hamam Singh Bhogal (1953 20 EACA 74 (10 March 1953), an appeal from the Supreme Court of Kenya, and has also been followed by the Court of Appeal in Kenya in the case of Hawkesworth vs Attorney-General [1974] EA 406, (7 October 1974).”

In the instant matter, the suit properties in dispute as per the Originating Summons is the same property that was in dispute in the District Magistrate’s Court Case No. 71 of 1964. The parties to the dispute are representative in interest of the parties before the Magistrate’s Court in 1964. The issue in dispute is the same in this matter as was in the District Magistrate’s Case No. 71 of 1964. Taking all these into account, I am convinced and satisfied that the doctrine of *res judicata* is applicable in this case. For this reason, I find that the learned judge correctly made a determination that that decision of the District Court in No. 71 of 1964 was the lawful and correct decision. The judge further correctly held that since no appeal had been filed against the decision, the Originating Summons was nothing but an attempt to re-open a matter that was long concluded. This finding and conclusion by the learned judge invokes and invites application of the doctrine of res judicata. I concur with the judge that the dispute between the parties was concluded in 1964. The dispute having been concluded and determined in 1964, it was not open to the judge to give further directions relating to the suit property. In any event, the High Court did not deliver the judgment in 1964 and the proper court to execute and implement the judgment of the court is the court that issued the decree. I thus find the learned judge erred in law in proceeding to give directions and pronounce herself beyond the correct finding that the District Magistrate’s Court Case No. 71 of 1964 had settled the dispute between the parties.

In arriving at my decision, I note that the trial court correctly observed that no appeal was filed against the District Magistrate’s decision in Case No. 71 of 1964. In **Nguruman Limited –v- Shompole Group Ranch & Another [2014] eKLR**, a five judge bench of this Court held that in the absence of a notice of appeal against a decision of the court, an appellate court lacks jurisdiction to grant any relief against the decision. Accordingly, I affirm that the decision of the District Magistrate’s Court delivered in Case No. 71 of 1964 stands. I am further comforted by the decision of the Supreme Court in **Anuar Loitiptip – v- IEBC & 2 others, SC Petition Nos. 18 & 20 of 2018**, where it was held that failure to launch a notice of appeal against specific decision would deem that party as having waived the right to challenge the decision.

On the issue of costs, it is trite that costs follow the event. The appellant in this matter having succeeded in defending the claim against adverse possession was entitled to costs before the learned judge. The respondent in this appeal submitted that the prayer in the Originating Summons was partially successful. Even if this were so, the respondent would have been entitled at most to an order that each party bears her own costs. However, noting that the judge erred in giving directions beyond the finding that the District Court Case No. 71 of 1964 had determined the dispute between the parties, I find that the judge erred in awarding costs to the respondent who was the losing party.

Accordingly, I would set aside the judgment of the High Court delivered on 14<sup>th</sup> July 2011. I would order that costs before the High Court be paid by the respondent. The upshot is that I find this appeal has merit and I would allow it with costs.

As Kiage J.A concurs, it is so ordered.

This Judgment is delivered pursuant to rule 32 (3) of the court of appeal rules as Odek, J.A. sadly passed on before the delivery of the Judgment.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of June, 2020.**

**ASIKE MAKHANDIA**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MAKHANDIA, KIAGE & ODEK, J.J.A) CIVIL APPEAL NO. 94 OF 2017 BETWEEN**

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(An appeal from the judgment and decree of the High Court of Kenya at Kisumu (**Abida A. Aroni, J.**) dated 14th *July, 2011* in

**ELC No. 900 of 2015 formerly HCCC No. 236 of 2002)**

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**JUDGMENT OF KIAGE, JA**

I have had the advantage of reading in draft the Judgment of my learned brother Makhandia, JA with which I agree and to which I have nothing useful to add.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of June, 2020.**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**AND**