



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A.)

CIVIL APPEAL NO. 68 OF 2015

BETWEEN

MOHAMMED WASWA.....APPELLANT

AND

OBADIA MICHA NYONGESA.....RESPONDENT

*(Appeal from the judgment and or decree of the High Court of Kenya at Bungoma (Omollo, J.) dated 19<sup>th</sup> March, 2015*

in

HCCA NO. 140 OF 2010

\*\*\*\*\*

JUDGMENT OF THE COURT

[1] This is a second appeal in litigation which originated from the Resident Magistrate's Court at Kimilili. Obadia Micha Nyongesa (who is now the respondent), is the proprietor of a property known as Kimilili/Kimilili/4476 (the suit property). He had filed a suit against Mohammed Waswa who is now the appellant, contending that the appellant had wrongfully trespassed on to the suit property by unlawfully entering the suit property and heaping construction materials on the property with an intention of constructing thereon. He sought an order that the appellant be directed to remove the building materials from the suit property.

[2] The appellant filed a defence and counterclaim in which he denied the respondent's claim and contended that he had heaped materials on his own plot which he purchased from one Benedicto Wanjala Sindani in 1993. He contended that the respondent had interfered with his quiet possession, and sought general damages for time lost in pursuing a complaint and a suit filed by the respondent at Webuye Law Courts.

[3] Upon hearing the suit, the trial magistrate found in favour of the respondent and ordered the appellant to remove all his building materials from the suit property within sixty (60) days.

[4] The appellant being aggrieved filed an appeal in the Environment and Land Court at Bungoma, contending, *inter alia*, that the trial magistrate failed to properly frame the issues that arose from the pleadings; erred in holding that the provisions of **section 21(4)** of the **Registered Land Act** (repealed) do not apply to the suit; erred in holding that the appellant had not produced any document of ownership; and rejecting the appellant's evidence that was adduced on both. The learned judge who heard the appeal (Anne Omollo J), found that both the appellant and the respondent appeared to be claiming the same parcel of land and the claim was therefore not a boundary dispute to which **section 21(4)** of the **Registered Land Act** (repealed) could apply; that the respondent had produced a title to the suit property and that title took priority over the appellant's agreement of sale. She therefore dismissed the appeal as having no merit.

[5] Undeterred, the appellant is now before us in this second appeal. In his amended memorandum of appeal, the appellant has raised seven grounds in which he, *inter alia*, faults the 1<sup>st</sup> appellate court for failing to find that the provisions of **sections 21 & 26** of the **Registered Land Act Cap 300** (repealed) were not complied with; failing to have regard to the provisions of **section 30** of the **Registered Land Act** (now repealed); failing to appreciate that the trial magistrate had no jurisdiction to entertain the dispute; failing to analyze the evidence that was adduced before the trial magistrate; and failing to find that the respondent's suit was *res judicata* there having been a previous suit in Webuye SRM case No. 262 of 2009.

[6] During the hearing of the appeal, the appellant relied on written submissions which were duly highlighted by **Mr. Omundi Bw'Onchiri**, the appellants advocate. A list of authorities, as well as a further list of authorities were also filed and relied on by the appellant. It was

submitted that the respondent's claim was actually a boundary dispute, as there was a claim for encroachment by the respondent and a counterclaim for interference with quiet possession by the appellant. The 1<sup>st</sup> appellate court was faulted for failing to properly determine the nature of the dispute.

[7] Further, it was submitted that the appellant had been in occupation of his property since 1963, and there was therefore an overriding interest that was protected by law. The jurisdiction of the trial magistrate was also questioned as the value of the suit property was said to be beyond the pecuniary jurisdiction of the trial magistrate. It was contended that the issue of *res judicata* having been raised, and the court's attention drawn to the previous proceedings between the parties, the court ought to have stayed the proceedings. The court was urged to allow the appeal and refer the suit back for a retrial.

[8] **Mr. Wayne Olonyi**, who appeared for the respondent, opposed the appeal arguing that the claim in the magistrate's court was a claim for trespass, and that the respondent had produced his title as the registered owner of the suit property, where the building materials were deposited by the appellant. It was argued that although the appellant claimed to have bought a parcel of land known as KIMILILI/KIMILILI/60, which was sub-divided into 28 plots, that is, 3730 - 3776, he did not establish whether that plot existed, and whether it had any connection with the suit property. [9] In regard to the issue of jurisdiction, it was submitted for the appellant, that no valuation report was availed to the Magistrate's Court to confirm that the value of the property in dispute was beyond the pecuniary jurisdiction of the Magistrate's Court. Finally, in regard to the issue of *res judicata*, it was submitted that no objection was taken on this ground in the Magistrate's Court.

[9] We have carefully considered this appeal, the record of appeal, the submissions and the authorities cited. This being a second appeal, we reiterate what Onyango JA stated in **Kenya Breweries Limited vs Godfrey Odoyo, [2010] e KLR:**

***“In a second appeal, however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on a second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision it is perverse.”***

[10] From the memorandum of appeal, and the submissions made before us, the first issue that we discern as arising for our consideration is whether in determining the appeal, the first appellate court properly identified the issues that were for determination before the trial magistrate in re-analyzing and re-evaluating the evidence that was adduced. In our view, this is an issue of law that properly falls for our determination.

[11] In her judgment, the learned judge considered whether the issue before the trial court was a boundary issue to which **section 21(4)** of the **Registered Land Act** (repealed) applied. **Section 21(2)&(4)** stated as follows:

21. (1) ...

***(2). Where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary.***

(3) ...

***4). No court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section.”***

[12] In this regard, the 1<sup>st</sup> appellate judge made a finding as follows:

***“The trial magistrate in his judgment, said, this was not a boundary dispute. From the evidence on record, the appellant stated that he bought his parcel of land from Benedict – deceased and in his view, plot 4476 fell squarely where his plot purchased from No. 60 lay. It is inferred that both the respondent and the appellant were probably claiming the same parcel of land. A claim for land cannot be said to be a boundary dispute and to this extent I agree with the magistrate's finding that section 21(4) of the Registered Land Act (repealed) do not apply.”***

[13] It is evident from the above, that the 1<sup>st</sup> appellate court properly appreciated the issue regarding the subject of the suit, and made a determination thereon. In our view, there was no boundary dispute, as neither party had approached the Registrar to determine the position of the boundary under section 21(2) of the Registered Land Act (repealed). Rather, the issue was whether the land upon which the appellant had deposited building materials was the suit property of which the respondent was the registered proprietor. We accept the finding of the two lower courts that the land was in fact the suit property. The respondent having proved his ownership of the suit property, and the appellant having failed to establish that the suit property was the same or part of KIMILILI/KIMILILI/60, which he allegedly purchased, the appellants alleged possession of the suit property was clearly a trespass and no overriding interest could arise under **section 27** of the **Registered Land Act** (repealed).

[14] As regards the issue of jurisdiction, the respondent pleaded at paragraph 10 of the plaint that the magistrate's court had jurisdiction. Although the appellant in his defence, generally denied all the allegations in the plaint, the appellant did not specifically deny the pecuniary jurisdiction of the court, nor did he raise any objection to the hearing of the suit before the trial court on account of pecuniary jurisdiction, nor was any evidence adduced regarding the pecuniary jurisdiction of the trial court or the value of the suit property. The issue of pecuniary jurisdiction, not having been raised, or deliberated upon, by the trial court, it was not open for consideration by the 1<sup>st</sup> appellate court.

[15] Regarding the issue of *res judicata*, although reference was made to another civil suit, Civil Case No. 262 of 2009, at Webuye Court, the issue of *res judicata* was not specifically pleaded in the defence. We take note that submissions were made before the trial magistrate regarding abuse of court process. The trial magistrate considered whether the respondents claim was an abuse of the court process but found that it was not.

[16] During the hearing of the appeal, the 1<sup>st</sup> appellate court addressed the issue of abuse of court process as follows:

*“In regard to the D. Exh.3 on abuse of the court process, the exhibits refer to orders given ex parte in that civil suit. The appellant did not pursue the objection to stay one of the suits before this one was heard and determined. The order in D. Exh. 3 was issued on 17<sup>th</sup> September, 2009. The respondent gave his testimony on 25<sup>th</sup> May, 2010. This objection was never raised by the appellant to stop the respondent from testifying. This matter having been concluded, such objection is overtaken by events.”*

[17] We have carefully perused the original record of appeal, and the supplementary record of appeal, but have not been able to trace D.Exh.3. However, from the judgment of the trial court, which is part of the court record, that exhibit was a copy of an uncertified court order. Under **section 7 of the Civil Procedure Act**, the circumstances in which the doctrine of *res judicata* may arise, are quite clear. The matter directly and substantially in issue in the suit before the trial court and in the former suit must be the same, and the parties or the parties under whom the parties are litigating must be the same, and the issues must have been heard and finally determined in the former suit. The trial court did not have the benefit of information upon which it could make a determination that these circumstances were obtaining such that the doctrine of *res judicata* could apply, and the learned judge of the 1<sup>st</sup> appellate court properly found that there was no abuse of the court process demonstrated.

[18] In light of our above findings, we find no merit in this appeal, and do therefore, dismiss it in its entirety. The appellant shall pay costs of the appeal to the respondent.

**DATED and delivered at Eldoret this 17<sup>th</sup> day of January, 2019**

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

*I certify that this is*

*a true copy of the original.*

**DEPUTY REGISTRAR.**