



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A.)

CIVIL APPEAL NO 104 OF 2015

BETWEEN

PENROSE SHISALA NAMISI.....APPELLANT

AND

THE COUNTY GOVERNMENT OF TRANS-NZOIA.....FIRST RESPONDENT

COUNTY PUBLIC SERVICE BOARD OF TRANS-NZOIA.....SECOND RESPONDENT

RATILAL GOSAR GODHIA.....THIRD RESPONDENT

VIPUL RATILAL.....FOURTH RESPONDENT

AVIR KANTI SHAH.....FIFTH RESPONDENT

(Appeal against the ruling and/or order of the Environment and Land Court of Kenya at Kitale (Obaga, J.) dated 16th September, 2015

in

KITALE ENVIRONMENT AND LAND COURT

CIVIL SUIT NO. 79 OF 2015)

JUDGMENT OF THE COURT

[1] By a plaint dated 8th June 2015, in Kitale Environment & Land Court (ELC) Civil Suit No. 79 of 2015 **Penrose Shilasala Namisi** (appellant) filed a plaint in the ELC at Kitale in which she sued the **County Government of Trans Nzoia** (1st respondent), **County Public Service Board of Trans-Nzoia** (2nd respondent), **Ratilal Gosar Godhia** (3rd respondent), **Vipul Ratilal** (4th respondent) and **Avir Kanti Shah** (5th respondent).

[2] The subject of the appellant’s suit was a property known as Kitale Municipality/Block 7/20 (herein the suit property). The appellant claims that she was married to one Benjamin Nyamumbo Oonge (Benjamin), and that during the subsistence of the marriage she acquired the suit property jointly with Benjamin, though the property was solely registered in the name of Benjamin. She filed ELC 79/2015 because Benjamin had secretly and fraudulently entered into an agreement to sell the suit property to the 3rd, 4th and 5th respondents, who had in turn transferred the suit property to the 1st respondent.

[3] The appellant had earlier filed Kitale ELC case No. 136 of 2014, against Benjamin, the 3rd, 4th and 5th respondents and had obtained an interlocutory injunction restraining Benjamin, the 3rd, 4th and 5th respondents from dealing with the suit property. The ELC court vacated that injunction on 15th March 2015. The appellant thereafter moved to this Court and applied for orders of stay against the lifting of the injunction. However, while the Court of Appeal matter was still pending, the respondents proceeded with the sale transaction. Thereafter,

the 1st and 2nd respondents commenced the process of procurement for the development of the suit property.

[4] It is with that background, that the appellant filed ELC Civil Suit No. 79 of 2015 and sought judgment against the respondents for a declaration that the sale and transfer of the suit property without taking into account her interest, was unlawful, null and void; and that orders of injunction should issue restraining the respondents, their agents or servants, jointly and severally from acquiring, taking possession, developing, constructing or in any way interfering with the suit property, to the detriment of the appellant during the pendency of the suit, that is ELC 79/2015.

[5] Contemporaneously with her plaint filed in ELC 79 of 2015, the appellant filed a notice of motion dated 8th June 2015, in which she sought interlocutory orders of injunction in regard to the suit property pending the hearing of ELC Civil Suit No. 79 of 2015. The appellant pleaded, *inter alia*, that the transfer, sale and development of the suit property would interfere with her rights under the Constitution of Kenya and the Matrimonial Property Act.

[6] The 3rd, 4th and 5th respondents, objected to the appellant's notice of motion through a notice of preliminary objection contending that the motion was *res judicata*, misconceived, devoid of merit and an abuse of the process of the court. The notice of motion was heard by the ELC (Obaga J) and a ruling delivered on 16th September 2015, in which the motion was struck out on the ground that it was *res judicata* and an abuse of the court process.

[7] Being dissatisfied with the ruling of 16th September, 2015, the appellant has lodged an appeal in this Court in which she challenged the ruling on nine (9) grounds. Basically the appellant maintains that the learned judge erred: in finding that the suit was *res judicata*; in wrongly applying the principles set out in ***Giella vs Cassman Brown & Co. Ltd. [1973] EA 358***; in failing to appreciate the several suits pending in regard to the suit property and the effect of failure to grant an injunction; and in failing to appreciate that the effect of lifting the orders of interlocutory injunction, was to finally determine Kitale ELC Civil suit Nos. 346 and ELC 79 of 2015.

[8] Hearing of the appeal proceeded by way of written submissions that were duly filed by the parties and orally highlighted in Court. Learned counsel, Ms Beatrice Kipkesgei, represented the appellant while Professor Nixon Sifuna represented the 1st and 2nd respondents; and Mr. Musambai Analo the 3rd, 4th and 5th respondents.

[9] In the submissions, the appellant focused on three (3) main issues, first, whether the judge was bound by his previous ruling in ELC No. 136 of 2014 delivered on 14th February, 2015, secondly, whether the application dated 8th June, 2015, was *res judicata*; and thirdly, whether the appellant had satisfied the threshold for grant of injunctive relief. The appellant submitted that the learned judge misdirected himself in holding that he was bound by his previous ruling and consequently, the learned judge failed to properly consider the issues before him.

[10] With regard to the application dated 8th June, 2015, the appellant drew the Court's attention to ***Benard Mbugwa Ndegwa vs James Nderitu Githae & 2 others [2010] eKLR***, which provided the following as factors to be used in determining whether a matter is *res judicata*: the fact that the matter in issue is identical in both suits; that the parties in the suit are the same; that there is sameness of the title and claim; that there is concurrence of jurisdiction; and that there is finality of the previous decision. The appellant argued that applying this test, her suit was not *res judicata* as the parties in the respective suits were not the same nor was the previous decision finally determined. She therefore urged the Court to find that the learned judge wrongly dismissed her motion on the ground that it was *res judicata*.

[11] The appellant further argued that she had met the threshold for the grant of injunctive relief as the evidence before the trial court showed that she had established a *prima facie* case, by demonstrating that her right to the suit property had been infringed by the respondents such as to call for an explanation from them. She therefore urged the Court to issue the injunction prayed for pending the hearing and determination of Kitale ELC No. 79 of 2015.

[12] Finally, the appellant pointed out that the lifting of the order of interlocutory injunction by the learned judge had the effect of predetermining her pending suits and therefore denied her a right to fair hearing. The appellant urged the Court that the orders of *status quo*, were in line with the doctrine of *lis pendens* which requires the maintenance of *status quo* during the pendency of the suit.

[13] For the 1st and 2nd respondent, it was submitted that the appellant's appeal was hopeless and totally without merit. It was maintained that the dismissal of the appellant's notice of motion was proper as the subject matter of the suit in ELC No. 79 of 2015, and ELC No. 136 of 2014, was the same as that of Civil appeal No. 44 of 2015. The 1st and 2nd respondents pointed out that in ELC 136 of 2014, the appellant had filed an application involving the same suit property seeking similar orders, which application was dismissed; that the appellant did not file an appeal against that dismissal but instead filed another suit, ELC 79 of 2015 together with another application for injunction under Order 40 of the Civil Procedure Rules. The 1st and 2nd respondents argued that that was an abuse of the court process.

[14] In addition, the 1st and 2nd respondents maintained that the application in ELC 79 of 2015, was dismissed because it was *res judicata* and an abuse of the court process. The court was urged that the learned judge properly exercised his discretion in dismissing the application; that since the appellant was claiming that the property belonged to her by virtue of her marriage, she had to prove the marriage; that the appellant did not tender any evidence in proof of her alleged marriage; and that to the contrary there was evidence before the court that she was married to someone else, one George Ndumbi.

[15] It was maintained that the appellant did not establish any *prima facie* case nor did she establish any irreparable loss that she was likely to suffer. In addition, that the balance of inconvenience was against the appellant because the suit property had already changed hands. The 1st and 2nd respondents therefore urged the Court to dismiss the appeal.

[16] For the 3rd, 4th and 5th respondents, it was submitted that the learned judge correctly applied the doctrine of *res judicata* in dismissing the appellant's motion dated 8th June, 2015. In this regard, counsel for the appellant relied on the case of ***John Florence Maritime Services***

Limited & another vs Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR, where this Court stated that courts ought to be vigilant to guard against litigants evading the doctrine of *res judicata* by merely adding new parties in respect of the same cause of action in subsequent suits.

[17] The Court was urged that the appellant's motion dated 8th June, 2015, in Kitale ELC No. 79 of 2015 was *res judicata* as there was already a similar application in Kitale ELC No. 136 of 2014 where the appellant had sought injunctive orders against the 3rd, 4th and 5th respondents to restrain them from interfering with the suit property. It was submitted that the earlier application was based on the same facts as the subsequent application which is the appellant's alleged interest in the suit property on account of being a spouse of Benjamin.

[18] The 3rd, 4th and 5th respondents further submitted that the learned judge correctly applied the principle in **Giella vs Cassman Brown** (*supra*) and properly exercised his discretion in refusing to grant the temporary injunction, as the appellant had failed to prove a *prima facie* case with the probability of success. In this regard, it was pointed out to the Court that Eldoret Divorce Case No. 8 of 1990, wherein the appellant was seeking a divorce against one George Obuya was still pending and the appellant could not therefore be legally married to Benjamin. Hence, the finding made in Kitale ELC 136 of 2014, that in the absence of a decree dissolving the appellant's marriage to George Obuya Ndumbi, the appellant could not be legally married to Benjamin.

[19] In addition, it was submitted that the appellant had not satisfied the Court that she would suffer irreparable loss that could not be compensated by damages as she could recover the equivalent of the share of the property that she is entitled to from Benjamin should it be found that she had an interest in the suit property. The Court was therefore urged to dismiss the appeal.

[20] We have considered the appeal before us, the submissions made by the parties and the authorities relied upon. The main issues that have been raised in this appeal is whether the learned judge erred in finding that the applicants motion dated 8th January, 2015 and filed in ELC 79 of 2015 was *res judicata* and/or an abuse of the process of the court.

[21] It is clear from the record of appeal and the annexures that were availed to the Court that ELC 136 of 2014 and ELC 79 of 2015 are suits that were filed by the appellant. The 3rd, 4th and 5th respondents were defendants in both suits, although in ELC 136 of 2014, the three respondents were sued jointly with Benjamin whilst in 79 of 2014 the three respondents were sued jointly with the 1st and 2nd respondent. In both suits the subject matter of the suit is land title No. Kitale Municipality Block 7/20. The similarities in the two suits is apparent from the claims made. In ELC 136 of 2014, at paragraph 8, 10 and 11 of the plaint it is pleaded as follows:

“8. The 1st defendant without the consent or involvement of the plaintiff transferred the lease in Kitale Municipality Block 7/20 to the 2nd, 3rd, and 4th defendants without considering the plaintiff's interests in the said property.

10. The transfer of the lease in Kitale Municipality Block 7/20 by the 1st defendant to the 2nd, 3rd and 4th defendants is illegal and no due diligence was exercised in perfecting the transfer.

11. The plaintiff's claim against the defendants is for a declaratory order declaring the transfer of a lease in Kitale Municipality Block 7/20 by the 1st defendant to the 2nd, 3rd and 4th defendants unlawful and an order for cancellation of the 2nd, 3rd and 4th defendants title and the same be reinstated to the name of the 1st defendant.”

[22] In ELC 79 of 2015 at paragraphs 21 and 22 of the plaint it is pleaded as follows:

“21. The plaintiffs claim against the defendant jointly and severally is for a declaration that the sale and transfer of land parcel No. Kitale Municipality Block 7/20 without taking into account the property interest of the plaintiff is unlawful and therefore null and void and the same should be set aside and property returns back to the registration of the husband of the plaintiff.

22. The plaintiff further claims for orders of injunction to be issued against the defendant, their agents and servants jointly and severally from acquiring, taking possession, developing, constructing or in any way interfering with the condition of the suit land to the detriment of the plaintiff during the pendency of this suit.”

[23] It is evident from these pleadings that the subject matter of the two suits is the same that is, land title No. Kitale Municipality Block 7/20 and the relief sought is also basically the same that is, a declaration that the sale and transfer of the suit property without taking into account the appellant's interests in the suit property is unlawful; and orders for restoration of the title to the suit property back to Benjamin.

[24] We reiterate what was stated by this Court in **John Florence Maritime Services Limited & another vs Cabinet Secretary for Transport and Infrastructure & 3 others** (*supra*) that:

“The ingredients of res judicata must be given a wider interpretation; the issue in dispute in the two cases must be the same or substantially the same as in the previous case, parties to the two suits should be the same or parties under whom they or any of them is claiming or litigating under the same title, the earlier claim must have been determined by a competent court.”

[25] The dispute in the two cases referred to herein was substantially the same, with the appellants claiming an interest in the suit property in her capacity as the spouse of Benjamin. The parties that is, the plaintiffs and the defendants in the two cases were litigating under the same title as proprietors or persons having beneficial interests in the suit property.

[26] In his ruling of 16th September, 2015, the learned judge had to determine first, whether the application before him was *res judicata*.

This was in light of the ruling of 26th February, 2015, in Kitale 136 of 2014, where the learned judge considering whether to grant an order of maintenance of *status quo* in regarding to the suit property herein, declined to issue the orders sought finding that there was no basis for the order as the appellant who was the applicant, had failed to demonstrate that she was married to Benjamin but had instead demonstrated that her marriage to George Obuya Ndumbi had not been dissolved. In that regard, the learned judge stated in the ruling of 16th September, 2015 as follows:

“She has not demonstrated what interest she has in the property. Her only argument is that she is a wife of Benjamin Nyamumbo Oonge. This Court in the previous ruling found out that she was not a spouse of Benjamin Nyamumbo Oonge.”

[27] We cannot fault the learned judge for that finding. The appellant’s claim and motion in ELC 79 of 2015 were anchored on her status as a spouse of Benjamin. This was the same issue that had been addressed in ELC 136 of 2014 and that status found not to have been established. True that the ELC court was dealing with an interlocutory application and therefore ought not to have made conclusive findings, but those findings not having been set aside the appellant could not ignore them and proceed to file another suit and another motion. That was indeed an abuse of the process of the court. Secondly, without suing Benjamin, her alleged husband, there was no link between her and the respondents upon which a *prima facie* case and her application for injunction could be founded.

[28] For the above reasons, the learned judge cannot be faulted for applying the doctrine of *res judicata* and dismissing the appellant’s motion. We find no merit in this appeal and do therefore dismiss it in its entirety. We award costs to the respondents.

We make orders accordingly.

DATED and delivered at Eldoret this 17th day of January, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REISTRAR