



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, MURGOR & KANTAL, J.J.A.)

CIVIL APPEAL NO. 117 OF 2008

BETWEEN

NGUGI KIUNA.....APPELLANT

AND

1. NELLY WANJIKU MWENJE.....1ST RESPONDENT

2. MARY WANJIKU MWENJE.....2ND RESPONDENT

3. MILKA WANJIRU MWENJE.....3RD RESPONDENT

4. ALICE WANGUI WAWERU.....4TH RESPONDENT

5. CHIEF LANDS REGISTRAR, NAIROBI.....5TH RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Nairobi (Aganyanya, J.) delivered on 23rd October, 2007

in

HCCC No. 986 of 2003)

JUDGMENT OF THE COURT

1. This is an appeal from the ruling of Aganyanya, J. (as he then was), delivered on 23rd October, 2007 in which the Court allowed an application by the 3rd and 4th respondents for dismissal of a suit (**H.C.C.C. No. 986 of 2003 at Nairobi**) that had been filed by the appellant on the ground that it was *res judicata*, on account of an earlier decision by Shields, J. in **H.C.C.C. No. 2850 of 1980**.

2. The 1st, 2nd and 3rd respondents died before this appeal came up for hearing. The appellant did not apply for their substitution and therefore the appeal as against the deceased respondents abated in terms of **rule 99(2) of the Court of Appeal Rules**.

3. The brief background to the appeal is that one Kennedy Mburu Mwenje (deceased) and the appellant had been sued by one Benson Kamau Mwenje (a son of the 2nd respondent, who is deceased) in **H.C.C.C. No. 2850 of 1980** at Nairobi. The dispute was over a portion of a parcel of land then known as **Muguga/Gitaru/278**.

4. In the ruling that gave rise to this appeal, Aganyanya, J. stated that in a judgment delivered by Shields, J. on 2nd February, 1991, the Court found that the disputed parcel of land belonged to the three surviving widows of one Wamarema Mwenje, deceased, who were the 1st, 2nd and 3rd respondents in this appeal, now deceased. The 4th respondent is a daughter of the 3rd respondent (deceased). No appeal was preferred against the aforesaid decision.

5. On 25th September, 2003 the appellant filed the suit that gave rise to this appeal, **H.C.C.C. No. 986 of 2003**, claiming that he was the registered proprietor of the parcel of land then known as Muguga/Gitaru/278, having bought it in 1980 at a price of Kshs.70,000/= from one Kennedy Mburu Mwenje, who was the co-defendant in H.C.C.C. No. 2850 of 1980.

6. The 4th respondent had deponed in her affidavit in support of the application for dismissal of the suit that the file in respect of Muguga/Gitaru/278 had been closed, the parcel of land having been subdivided into six subdivisions known as **L.R. Muguga/Gitaru/1911, 1913, 1915, 2103, 1873 and 1874** and title deeds thereto issued sometime in 2004.

7. Regarding the appellant's allegation that he was the registered proprietor of the original parcel of land, the trial court found:

“Though in paragraph 4 of the plaint filed in court on 25th September 2003 the plaintiff alleges he is the registered proprietor of L.R. Muguga/Gitaru/278, it would appear this is the year the HCCC No. 2850 of 1980 was going on and that after the judgment of Judge Shields around the same year the parties in whose favour the judgment was delivered, including the plaintiff herein must have set about to subdivide the said land in the portions herein set out in paragraph 2 of the supporting affidavit.”

The court further observed that the subdivision was done pursuant to a court order, although the appellant had unsuccessfully sought to challenge the legal process that gave rise to the orders to subdivide the land.

8. In view of the foregoing, Aganyanya, J. (as he then was), held that the suit was *res judicata* because the dispute over ownership of Muguga/Gitaru/278 had been conclusively determined in H.C.C.C. No. 2850 of 1980 and dismissed the case. The applicant had not been heard by the court because he was late in filing a replying affidavit and/or grounds of objection in response to the application for dismissal of his suit. His advocate's application to address the court in the absence of the aforesaid papers had been rejected.

9. Being aggrieved by that decision, the appellant preferred an appeal to this Court. The appellant stated, *inter alia*, that the learned judge erred in finding that the suit was *res judicata*; in dismissing his suit without having considered the issues raised in that suit and without any evidence; in denying him an opportunity to respond to the respondents' application; in failing to appreciate that H.C.C.C. No. 2850 of 1980 was dismissed in his favour; in considering obiter statements in the judgment of Shields, J; in finding that the appellant was involved in subdividing Muguga/Gitaru/278 and that the subdivision was as a result of the judgment in H.C.C.C. No. 2850 of 1980; and in stating that the appellant was the son of the 2nd respondent.

10. When this appeal came up for hearing, **Mr. Richard Ongegu** appeared for the appellant on behalf of **Mr. J.D. Murimi**, while **Mr. Mugo** held brief for **Mr. Wambugu** for the 4th respondent and **Mr. Stephen Terrel** appeared for the 5th respondent. Counsel relied on submissions that had been filed and made brief oral highlights.

11. From the submissions on record, the dispute between these parties has had a chequered history, if the litigation that has been in various courts since 1980 upto 2018 is anything to go by. After determination of the first dispute in 1991 by Shields, J; on or about 14th June, 2002 the 1st respondent, (now deceased), filed a land dispute case against Benson Kamau Mwenje and Kennedy Mburu Mwenje at the Kikuyu Land Disputes Tribunal, **Case No. 16/20/27/2002**.

12. On 14th October, 2002 the Tribunal held that the appellant herein was entitled to a refund of his money, Kshs.70,000/=, otherwise he should benefit from a share of the late Kennedy Mburu Mwenje's share of the land. As none of the relatives of Mburu Mwenje's mother were willing to refund the said sum, the Tribunal considered that 0.25 acres was adequate compensation to the appellant.

13. Consequently, the Tribunal ruled that the title to Muguga/Gitaru/278, which was then in the appellant's name, be revoked and new ones issued as follows:

Nelly Wanjiku Njoroge (1st Respondent) – 0.375 Acres Mary Wanjiku Mwenje (2nd Respondent) – 0.3125 Acres

Milka Wanjiru/Alice Wangui Mwenje (3rd and 4th Respondents) – 0.9625 Acres

Ngugi Kiuna (Appellant) – 0.25 Acres

We doubt whether the Tribunal had power to order revocation of a valid title document.

14. The appellant appealed against that award to the Provincial Lands Appeals Committee. It would appear that the appeal was unsuccessful because the appellant filed **H.C.C.C. Appeal No. 24 of 2009 at Nyeri** to challenge the decision of the Nyeri Provincial Land Disputes Tribunal. It is not clear what became of that appeal.

15. Meanwhile, following delivery of the decision of the Kikuyu Land Disputes Tribunal, on 14th October, 2002 the decision was adopted by the Kikuyu Senior Resident Magistrate's Court as a judgment of the court. Subsequently, sometime in August 2013 the 4th respondent filed **Misc. Application No. 36 of 2003** against the appellant at the Senior Principal Magistrate's Court at Kiambu. She sought the following orders:

“(1) That the Executive Officer of this honourable Court be authorized to execute all the relevant documents on behalf of the Respondent/the appellant) to facilitate smooth subdivision of Land Parcel No. Muguga/Gitaru/278 in the following mode of distribution:

(a) Nellie Wanjiku Mwenje – 0.375 Acres

(b) Mary Wanjiku Mwenje – 0.3125 Acres

(c) *Alice Wangui Waweru – 1.2125 Acres*

And the applicant herein do pay/refund Kshs.70,000/= to the Respondent owed to him being in consideration of 0.25 acres in default, the same to be deposited in Court.

(2) *That the title deed in respect of land parcel No. Muguga/Gitaru/278 to be dispensed with.*

(3) *That the restriction lodged on 8/1/82 vide suit No. 2850/1980 listed as the same has been disposed off. (sic)*

(4) *Costs of the application be borne by the respondent.”*

16. On 20th August, 2003 the application was heard and orders were granted as sought. Although the appellant alleged that he had not been served with the hearing notice, it appears that he did not appeal against the said orders. Instead he filed **H.C.C.C. No. 986/2003** that was subsequently dismissed by Aganyanya, J.

17. Upon obtaining the aforesaid orders, the 4th respondent, without the appellant’s participation, subdivided Muguga/Gitaru/278 as earlier stated. Some of the subdivisions were sold to some third parties way back in 2004 and title deeds have since been issued to them. The new owners were not parties to H.C.C.C. No. 986 of 2003, although the record shows that the appellant had filed an application to amend the plaint with a view to including them as defendants. Obviously, the application could not be heard, the suit having been dismissed.

18. In light of the foregoing, did the trial judge err in finding that the matter was *res judicata*? To determine this issue, we need to consider the nature of the claim that was made against the appellant and his co-defendant in H.C.C.C. No. 2850 of 1980 and contrast it with the appellant’s claim against the respondents in H.C.C.C. No. 986 of 2003.

19. **Section 7 of the Civil Procedure Act** states 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 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.”

20. In **MAITHENE MALINDI ENTERPRISES LTD v KANIKI KARISA KANIKI & 2 OTHERS [2018] eKLR**, this Court held that for the bar of *res judicata* to be effectively raised and upheld 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.”

21. The plea of *res judicata* also applies not only to points upon which the court was actually required by the parties to pronounce itself on, but also to every point which properly belonged to the subject matter of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. See **HENDERSON v HENDERSON (1843) 67 ER 313**.

22. The plaint that was filed by Benson Kamau Mwenje in H.C.C.C. No. 2850 of 1980 was not included in the record of appeal. But the decree is there. It shows that the claim was for:

“A. (1) A declaration that the plaintiff has acquired title to 0.95 Acres or ½ of land reference No. Muguga/Gitaru/278 by adverse possession and that the second Defendant hold (sic) the one half of the said land in trust for the plaintiff and the 2nd Defendant’s title to the said 0.95 Acres or thereabouts has been extinguished.

(2) A declaration that the 1st Defendant has at all material times held one half of the land measuring 0.95 acres in land reference No. Muguga/Gitaru/278 in trust for plaintiff.

B. An order that the 2nd defendant to transfer to the plaintiff forthwith the one half acre of land reference No. Muguga/Gitaru/278 which one half thereof measured 0.95 Acres or thereabouts free from all encumbrances.

C. Costs of this suit and interest thereon on court rates.

D. Any other or further relief this Honourable Court may deem fit to grant.”

23. The orders issued were for dismissal of the suit with costs to the defendants. But it is important to examine some pertinent issues that were

brought out by Shields, J. in his one and a half page judgment. He stated, *inter alia*, that:

(i) Benson Kamau Mwenje (the plaintiff) was the grandson of Wamarema Mwenje who was the owner of the property, parts of which were in dispute.

(ii) That Wamarema died in 1953 leaving 4 widows surviving him.

(iii) That Wamarema’s estate consisted roughly of 4 acres of land which was divided equally among the 4 widows, the senior most known as Nyambura was childless and she died in 1963.

(iv) The plaintiff, son of the 2nd widow, Wanjiku, used to stay with Nyambura and the plaintiff had alleged that by her will Nyambura had bequeathed her share to him. However, in Civil Case Appeal No. 19 of 1978 at Kiambu it was established that the said document was not a valid will and that Nyambura died intestate.

(v) Nyambura’s property in the 1 acre was inherited by the 3 surviving widows, one of them being the plaintiff’s mother,

Wanjiku.

(vi) That the plaintiff had only an expectancy to share in his mother’s estate if he survived her.

24. In light of those facts, the learned judge found no merit in the plaintiff’s suit and dismissed it in favour of the appellant and his co-defendant. In H.C.C.C. No. 986 of 2003, the appellant had stated that he bought Gitaru/Muguga/278 from Kennedy Mburu Mwenje, who was the first defendant in H.C.C.C. No. 2850 of 1980. The said parcel of land had been registered in the name of Kennedy Mburu Mwenje way back in 1977.

25. The appellant further stated that it was not until October 2002 that the respondents started claiming interest in the suit premises and filed Land Dispute Case Number 16/20/27 of 2002.

26. In H.C.C.C. No. 986 of 2003, the prayers that the appellant sought were as follows:

“i. A declaration that the Kikuyu Land Disputes Tribunal award and subsequent decree issued in LND 16/20/27/2002 was made contrary to the provisions of the Land Disputes Tribunal Act and without any jurisdiction and is therefore null and void.

ii. A declaration that the decree issued by the Senior Principal

Magistrate’s Court in Kikuyu Misc. Application No. 24 of 2002 is contrary to the principles of natural justice; was issued without following the due process of the law and the Court lacked jurisdiction. Consequently the said decree is null and void.

iii. A declaration that the decree issued in Senior Resident Magistrate’s Court Kiambu Civil Suit No. 36 of 2003 is contrary to the provisions of natural justice; was issued without following the due process of the law; the Court did not have jurisdiction and hence is null and void.

iv. Permanent injunction to restrain the Defendants by themselves/agents and/or their family members from entering upon the suit premises or in any way interfering with the quiet possession of the suit property.

v. An Order directing the 5th Respondent herein to recall all the title deeds issued after the subdivision of the suit property and cancel the same.

vi. An eviction order against the 1st, 2nd, 3rd and 4th Defendants (Respondents herein, their servants, and/or agents) from occupying the suit premises.

vii. Special damages of Kshs.500,000/=.

viii. General damages.

ix. Any other relief the Court may deem just to grant.”

27. Looking at the issues and the prayers sought in H.C.C.C. No. 986 of 2003, it is evident that they were not directly and substantially similar to the ones in H.C.C.C. No. 2850 of 1980. Secondly, Shields, J. did not make orders that were adverse to the appellant’s title. The learned judge briefly examined the history of the parcel of land in dispute and concluded that Benson Kamau Mwenje, the plaintiff, had no valid claim to the share of the suit land. Consequently, the court dismissed the suit in favour of the appellant, the then registered owner.

28. H.C.C.C. No. 2850 of 1980 was not about ownership of Muguga/Gitaru/278, it sought declaratory orders that the plaintiff therein had acquired title to 0.95 acres or one half of the said parcel of land by adverse possession and that the appellant herein held that that one half in trust for the plaintiff. The court rejected that contention and dismissed the suit.

29. In the circumstances, it cannot be said that the issues raised in H.C.C.C. No. 986 of 2003 had been heard and finally determined in the former suit.

30. For the aforesaid reasons, we agree with the appellant that Aganyanya, J. erred in law in summarily dismissing the appellant's suit as being *res judicata*. This finding alone is dispositive of the entire appeal and it would be superfluous for us to consider the other grounds of appeal, and more so because a determination of some of them may be prejudicial to the parties in any subsequent litigation before the appropriate court.

31. We are aware that land parcel number Muguga/Gitaru/278 has since been subdivided and title deeds to the various subdivisions issued. However, the process and legality of that sub-division has been questioned by the appellant in his suit.

32. Having found that the appellant's suit was wrongly dismissed, and summarily so, we allow this appeal, set aside the ruling dated 23rd October, 2007 in H.C.C.C. No. 986 of 2003 and substitute therefor an order that the said matter be and is hereby remitted to the Environment and Land Court for hearing and determination. The appellant is awarded costs of this appeal.

Dated and delivered at Nairobi this 8th day of February, 2019.

D.K. MUSINGA

JUDGE OF APPEAL

A.K. MURGOR

JUDGE OF APPEAL

S. ole KANTAI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR