



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL NO. 114 OF 2015

BETWEEN

MOHAMMED NYONGESA SICHANGI.....APPELLANT

AND

BENSON N OPWORA.....RESPONDENT

(Appeal from the ruling of the Environment & Land Court of Kenya at Bungoma (Mukunya, J.) dated 12th November, 2015

in

LAND AND ENVIRONMENT CASE NO. 63 OF 2015)

JUDGMENT OF THE COURT

[1] By a ruling dated 12th November, 2015, the Environment and Land sitting at Bungoma (Mukunya J.), struck out the appellant's suit and a notice of motion filed in the suit, for want of merit and abuse of the process of the court. Being aggrieved, the appellant **Mohammed Nyongesa Sichangi**, lodged an appeal before us, in which he raised twelve grounds.

[2] In a nutshell, the appellant faults the learned judge in dismissing his suit, contending that the learned judge based his decision on erroneous findings concerning a suit that had been filed by the respondent; that the judge failed to note that the dispute in the previous suit was a rent dispute and not a land dispute; that the judge took into account extraneous matters; and that the judge failed to find that the Business Premises Rent Tribunal (BPRT) had no jurisdiction to entertain the dispute.

[3] Both the appellant and the respondent filed written submissions, each urging the court to find in his favour. During the hearing of the appeal, the appellant who was in person, highlighted his submissions while counsel Omundi Bw'onchiri, who appeared for the respondent also highlighted the respondent's submissions.

[4] The appellant submitted, that the learned judge was mistaken in finding that he had filed BPRT case No. 34 of 2014, when it was the respondent who had filed the suit; that the striking out of the appellant's suit as an abuse of the process of the court without giving him a chance to be heard was totally unfair; that the BPRT had issued an order in which it referred the parties to the Environment and Land Court contending that it had no jurisdiction to determine the ownership dispute in respect of the property; that there were triable issues in the appellant's suit, concerning the issue of ownership and therefore the court ought to have heard the suit and resolved the issues; and that the principle of *res judicata* was not applicable as neither the BPRT nor the Environment and Land Court handed down a final judgment.

[5] For the respondent it was submitted, that the BPRT Kakamega Case No. 34 of 2014, allowed the respondent to take possession of the suit property under section 12(1)(e) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, and to levy distress against the appellant for recovering of arrears of rent of Kshs.103,350/= as of May, 2015. It was submitted that under **section 15 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act**, a party aggrieved by an Order, made by the BPRT, was at liberty to file an appeal to the High Court; that instead of filing an appeal, the appellant filed a new suit by a plaint dated 21st May, 2015, in which he contended that the orders made by the Business Tribunal in Case No. 34 of 2014 was a nullity, and prayed for a declaration to that effect; that the appellant having failed to file an appeal against the orders made by the BPRT in Case No. 34 of 2014, he could not re-litigate the same issues in a new suit and the learned judge was therefore right in striking out his plaint because it was an abuse of the court process. The Court was therefore urged to dismiss the appeal.

[6] We have considered this appeal, the submissions made before us, and the authorities cited. From the record of appeal, it is apparent that there were proceedings between the appellant and the respondent in BPRT, Kakamega Case No. 34/2014, wherein the respondent filed a reference as a Landlord against the appellant as the Tenant. There is a copy of an order in the record dated 11th September, 2014, showing that BPRT granted leave to the respondent to levy distress against the appellant. There is also another order made on 18th October, 2015, by BPRT in the same case granting leave to the respondent to levy distress against the appellant, and also granting leave to the respondent as landlord to take possession of the suit premises. These orders have not been set aside, nor, has the appellant filed an appeal challenging them. Instead, the appellant challenged the orders through his plaint filed in the Environment and Land Court Case No. 63 of 2015, in which he sought a declaration that the proceedings in the BPRT, Case No. 34 of 2014, were null and void. Clearly, the appellant failed to follow the laid down procedure in challenging the orders of the BPRT. It appears that the appellant is now challenging the rights of the respondent to ownership of the suit property. This is an issue that ought to have been raised before the BPRT as a defence. If indeed, the respondent had no right to ownership of the suit property, then, the BPRT ought not to have granted the respondent an order for possession of the suit property.

[7] The principle of *res judicata*, is encapsulated in **section 7 of Civil Procedure Act**, which provides that:

“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.”

[8] In this case, there was a former suit filed in BPRT, between the parties, in which the issue between the parties was payment of rent and possession of the suit property. Under explanation No. 4 to section 7 of the Civil Procedure Act, any matter which might and ought to have been made a ground of defence or attack in such former suit, shall be deemed to have been a matter directly and substantially in issue in such suit. It is evident that the parties were litigating in the former suit as landlord and tenant. If the appellant disputed the respondent’s rights to ownership of the suit property, then this was a defence that must be deemed to have been a matter directly and substantially in issue before the BPRT. In any case, a tenant is by **section 121 of the Evidence Act** estopped from denying the landlord’s title. It was not therefore open to the appellant to bring the issue afresh in a new suit. At best, if the appellant was challenging the jurisdiction of the BPRT, then, he ought to have filed an application for judicial review.

[9] The upshot of the above is that, the learned judge was right in dismissing the appellant’s plaint, and the notice of motion anchored on the plaint, as the appellant’s suit was an abuse of the court process. We find no merit in this appeal and do therefore dismiss it with costs.

DATED and delivered at Kisumu this 19th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.