



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA
(CORAM VISRAM, KARANJA & KOOME J.J.A)

CIVIL APPEAL NO 81 OF 2017

BETWEEN

ESTHER NZINGO KALUME.....APPELLANT

VERSUS

LAWRENCE SHARRIFF SAMSON KATITI.....RESPONDENT

(Being an appeal from the Ruling and Decree of the

Environment and Land Court of Kenya at Mombasa

(Omollo J.) made on 20th July, 2017

in

Mombasa E.L.C No 66 of 2013.)

JUDGMENT OF THE COURT

[1] The dispute that has escalated to the present appeal turns on whether the tenancy or ownership of a plot in Mtwapa area described variously as sub-division **CR 51653/4 Mtwapa Creek Land Reference No. 6387** being **subdivision No. 3843 of Section 111 Mainland North** (suit property), was determined in a suit filed in Kilifi being **SRMCC No. 66 of 2006**; between Rachel Kavumbi (the late mother of the appellant) and Lawrence Shariff Samson Katite (respondent) and whether the same issue was res judicata as held in **Environment Land Court (ELC) case no 66** the subject of this appeal. This appeal will therefore entail an examination of the issues that were pleaded before the magistrate's court and before the ELC.

[2] On 25th January, 2007 the appellant's mother, the late Rachel Kavumbi who died on 29th September, 2008 and was substituted by the appellant filed a suit before the Resident Magistrate's Court at Kilifi against the respondent claiming a sum of Kshs.114,000 made up of ground rent arrears with effect from June, 2004 in the sum of Kshs.39,000 and unpaid purchase price of Ksh.75,000 which was due and owing as per the particulars that were communicated to the respondent. The appellant prayed for the said sum of Ksh.114,000 and mesne profits. Subsequently the said suit was settled by an order that is recorded in the following terms:-

“ORDER

Upon reading the letter of consent judgment dated 20th March, 2008 and filed in Court by M/S J.C. Chidzipha & Advocates and M/s Gunga Mwinga & Company Advocates.

IT IS HEREBY ORDERED:-

- 1. That the Defendant to pay a sum of Kshs.173,805/- to the Plaintiff made up as follows:***

Plaintiff's Advocates fees	15,500/-
Plaintiff's claim	94,500/-
M/S Murphy Auctioneers fees	56,000/-
Plaint fees	<u>7,805/-</u>
TOTAL	<u>173,805/-</u>

2. That the Defendant to pay a deposit of Kshs.30,000/- forthwith and the balance of Kshs.143,805/- be paid in equal monthly instalments of Kshs.10,000/- w.e.f. 5th May, 2008 and thereafter on the 5th day of every succeeding Month till payment in full. In default of any single instalment, the Plaintiff be at liberty to execute for the balance outstanding, then.

3. That Auctioneer do forthwith release the Defendants goods.”

[3] It is not very clear from the records whether the respondent settled the matter as per the said consent order, but be that as it may, on 18th April, 2013 the appellant filed the said suit before the ELC claiming that the respondent was tenant on part of the subdivision (suit land) measuring approximately (0.16) of an hectare. Being a tenant the appellant gave the respondent the first option to purchase the plot which offer he accepted and they commenced negotiations and a purchase price of Ksh.2 million was agreed upon, with a deposit of 20% being paid on the signing of the agreement. According to the appellant the respondent declined to sign the agreement despite being requested to do so by her advocates. The appellant therefore prayed for an order of eviction of the respondent from the suit property and a permanent injunction to restrain the respondent from entering or otherwise interfering with the suit property in any manner whatsoever.

[4] The said suit was resisted by the respondent by his defence and counter claim dated 7th July, 2015. In it the respondent pleaded want of contract for sale between the appellant and respondent and in particular the matter being *res judicata* vide an agreement the respondent claims to have entered into with the appellant's mother on 30th August, 2007 where she agreed to sell the suit property for an aggregate sum of Ksh.96,000 by way of ground rent and transfer fees for three plots then in occupation by the respondent. That became a subject of the suit before the Senior Resident Magistrate's Court at Kilifi which was settled by consent. The counterclaim sought orders that the suit be struck out or dismissed for failure to comply with the law of contract and **Section 7** of the Civil Procedure Act and the appellant be compelled to complete and transfer the suit premises or in default the Deputy Registrar of the court to do so.

[5] This was immediately followed hot on its heels by an application by way of Notice of Motion brought under **Section 1A, 3A, 7 and 15** of the Civil Procedure Act seeking the suit be struck out for being res-judicata or in the alternative, it be stayed until the parties execute the decree in the Kilifi matter or the Kilifi matter be transferred to ELC for trial under the principle expounded in the case of **Isadore Bagorogoza Mbarinda (1959) EA**. This is the application that fell for hearing before **Omollo, J.** who after hearing both parties made the following conclusion on a pertinent part of the ruling that has provoked the present appeal:-

“The consent judgment entered against the defendant in SRMCC No 66 of 2007 was inclusive of purchase price which was stated at Ksh 75000= as stated in paragraph 4 of the plaint thus; “That it was also a material term of the said tenancy agreement between the plaintiff and the defendant that the defendant do pay a sum of Ksh 75000 being the purchase price thereof.”

This paragraph read together with paragraph 5 of the same shows a sale took place between the plaintiff and the defendant. Therefore the present plaintiff having acquired her rights through her mother (who was the former plaintiff) cannot and should not be allowed to generate new cause of (sic) auction over the same subject land. I do agree with the defendant that the current claim is res judicata.

In conclusion, I find merit in this application in terms of prayer 1. Consequently I strike out this suit for being res judicata. The result is there is nothing to transfer to Malindi ELC for trial & determination. I also award costs of this application and the suit to the defendant”

[6] This is the gravamen of this appeal that is predicated on some 4 grounds of appeal that have challenged the ruling by the learned Judge for finding that the issues raised in the suit in ELC were similar to the issues raised in Kilifi SRMCC No. 66 of 2006; for finding the magistrate's court had jurisdiction to try issues of registered land; for finding that the appellant's title was obtained in 2010 but yet struck out the suit on the basis that the appellant made the claim through her parents and finally for failing to appreciate that the notice of motion dated 15th July, 2015 had not satisfied the mandatory provisions of **Section 7** of the Civil Procedure Act Cap 21.

[7] This appeal was ventilated through written submissions, filed with the leave of the Court; both parties represented by Mr. Kongere and Mr. Kimani learned counsel for the appellant and respondent respectively, adopted their written submissions and did not make any oral highlights. On the part of the appellant, it was submitted that the claim in the two suits were different as there was no mention in the suit at Kilifi that the land in question was subdivision No 4593. Referring to a deed of assignment dated 27th November, 2003 which purportedly granted the respondent occupation, the property in issue is identified as plot number 742/111/MN. The alleged sale agreement dated 30th August, 2007 pleaded by the respondent refers to plot number 3848/111/MN. Such that, with conflicting plot numbers that was supplied by the respondent, there was no basis for the court to ascertain that the property in question as per the Kilifi suit was subdivision no 4593 and not any other titles referred to above.

[8] Further according to the appellant's submissions the issue of transfer never featured anywhere in the Kilifi suit and the respondent was aware that as the ground tenant, he was paying Ksh.1500 per month and the tenancy agreement required him to pay Ksh.75,000 which was a

purchase price for the tenancy agreement and not the price of the land; it is for that reason the respondent's advocates wrote a letter dated 10th October, 2012 to the appellant's advocates and stated as follows:-

“My client is a tenant in possession of the above mentioned land...this tenancy has not been terminated. It has however been the subject of consent judgment in previous rent collection proceedings...my client nevertheless still interested in closing negotiations to make an outright purchase of the land.”

Therefore the claim in the Kilifi matter was a liquidated claim for rent while the claim in the ELC was for eviction of a tenant whose tenancy had come to an end by the registered proprietor. Counsel for the appellant also cited a litany of authorities some of which we shall refer to the cause of the analysis of this matter.

[9] On the part of Mr Kimani, learned counsel for the respondent, it was submitted that the suit in ELC did not disclose any cause of action for failure to specify the particulars of the land as required under **order 4, rule 3** of the Civil Procedure Rules. The issue of sale and transfer was settled by a consent order recorded in the suit before the SRMCC in Kilifi and the doctrine of *res judicata* applied to the present suit as the appellant's mother drew full benefit from the said action, where she was the plaintiff. The decree in the said case has never been set aside and all benefits drawn by the appellant's mother cannot be reversed. Any outstanding issue regarding the satisfaction of the decree issued by consent could not be dealt with in a separate suit by reason of the provisions of **Section 34** of the Civil Procedure Act, as the appellant as the administrator of the estate of Rachel Kavumbi is bound by the actions of her mother.

[10] The issue in both suits related to the purchase price of the same suit property by the same parties. Counsel relied on several authorities to define what a consent judgment is and what constitutes privity of contract as was stated in a leading **Text Book Mulla Civil Procedure Code**, 12th Edition, Vol I page 62; the case of **WILDING V SANDERSON** (1897) 2CH, 534 at page 543 to buttress the point that a consent judgment is conclusive of a matter and has to all intents and purposes the same effect as *res judicata* as a decree passed.

[11] We have taken liberty to summarize the salient matters that were before the trial court so as to put this appeal in context. We have also considered the record, the submission by the learned counsel and the law. We discern two issues for determination as adverted to in the opening paragraphs that is; whether the two suits involved the same issues that were litigated and if so whether the suit was *res judicata* by dint of the decision in SRMCC No 66 of 2007. The essence of the doctrine of *res judicata* was aptly set out by this Court in **William Koross vs. Hezekiah Kiptoo Komen & 4 Others [2015] eKLR-**

“The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.

...

The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties –because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit.

See also **Nguqi vs. Kinyanjui & 3 Others [1989] KLR 146.**

[12] Therefore, 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.***

See **Section 7** of the **Civil Procedure Act** and this Court's decision in **Independent Electoral & Boundaries Commission vs. Maina Kiai & 5 Others [2017] eKLR.**

[13] To us the issues that were before Kilifi SRMCC No.66 of 2007 was a liquidated claim for Ksh.114,000 and mesne profits which was settled as per the consent order. The respondent is described as a tenant but the description of the premises is not given. There was no claim over the title therefore just like the learned Judge, we find the Kilifi Court had jurisdiction to deal with the issues raised therein. Where we however part company with the learned Judge was the conclusion that both suits were similar when she posited as follows;-

“...Further the claim in the former suit clearly referred to the issue of unpaid purchase price and arrears of ground rent. This corroborates the current pleadings which states that the defendant was a tenant. In the coast province payment of ground rent

would be referred to (sic) to refer to the proprietorship of house without land and not necessarily the usual landlord/tenant relationship”

The above conclusion left certain issues hanging; a tenancy relationship is a continuous one until when it is terminated. Is a suit for recovery of rent, a bar to a subsequent one for recovery of the same land on the strength of a title? Was the respondent a tenant or a purchaser, and if so, after paying the decretal sum as stated in the consent what next; was he entitled to a transfer and if so of which plot because none was pleaded in the Kilifi suit and in any case that court would not have jurisdiction to transfer. Was it for that reason the respondent filed a counter-claim within the ELC matter? Another question to ponder is what became of the counter-claim; these are valid issues of justice and equity which require a substantive determination.

[14] We find the conclusion drawn by the learned Judge that the consent order recorded settled the issues of purchase price erroneous for reasons that the plot number of the suit property was not stated; secondly going by the Judge’s own conclusions it is not clear whether the purchase price was for the plot without land or as the appellant alleges it was a purchase of the assignment of the lease agreement from the previous tenants; thirdly to hold as the Judge did that the dispute in Kilifi was same as the one litigated under the ELC would contradict the Judge’s earlier finding that the Kilifi Court had jurisdiction to determine matters of title which was not even pleaded. We think substantive justice in regard to the dispute between the parties would be attained if the suit being ELC No 66 of 2013 is given a hearing.

[15] It is during the hearing when the central characters in the suit can elicit evidence on the alleged tenancy, sale agreement, if the plot was sold by the predecessor of the appellant; what purchase price was paid, was it in respect of house without land as alluded by the Judge was it purchase price of a plot and if so which particular plot, was it the same in the Kilifi suit and the one pleaded in the ELC matter as Subdivision No. 4593 section 111 Mainland North, who owns the development as well as the many issues raised by the respondent in the counterclaim on whether the appellant should be compelled to transfer the said plot to the respondent among others.

[16] We think we have said enough to demonstrate the appeal herein has merit. It is allowed with the result that the orders made on 20th July 2017 is hereby set aside and substituted with an order dismissing the respondent’s notice of motion dated 13th July 2015. The suit being ELC No 66 of 2013 is reinstated for hearing before any other Judge other than Omollo, J. Costs of this appeal shall abide the outcome of the suit.

Dated and delivered at Mombasa this 7th day of June, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K.KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR