IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: NAMBUYE, WARSAME & M'I NOTI , JJA]

CIVIL APPEAL NO. 29 OF 2010

BETWEEN

JUSTINE KASIMU NDOLO.....APPELLANT

AND

PROF. JOSEPH KAMUYA MAITHA.....1ST RESPONDENT

ELIZABETH KAMEME NDOLO *(Sued as the Executor of the last will of*

Joseph Musyimi Lele Ndolo).....**2nd RESPODNENT**

SILA MUSYIMI NDOLO.....3RD RESPONDENT

MWAANI ENTERPRISES LTD.....4TH RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Machakos

(Lenaola, J.) dated 9th November 2009

in

H.C. C.C. No. 154 of 2009)

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JUDGMENT OF THE COURT

This is an appeal from the ruling and order of **Lenaola, J.** (as he was then) dated 9th November 2009, declining to strike out the 1st respondent's plaint dated the 21st October 2002 and amended on the 29th day of May 2007.The background to the appeal is that the **1st respondent, Prof. Joseph Kamuya Maitha**, filed suit against the **appellant, Justine Kasimu Ndolo** and **Elizabeth Kamene Ndolo (2nd respondent), Musyimi Lele Ndolo (3rd respondent)** and **Mwaani Enterprises Ltd (4th respondent)**, contending in the main, that the respondents, beneficiaries of the Estate of **Joseph Musyimi Lele Ndolo (the deceased)**, had wrongfully subdivided **LR Nos. 1756/7** and **1756/8** without regard to his 1000 acres that he had purchased from the 2nd respondent as executrix of the Estate of the deceased, to save the entire **LR No. 1756 from** being sold in an auction. He contended that after the purchase, he took possession of the said 1000 acres and was in occupation at the material time. The 2nd, 3rd and 4th respondents filed defences and counterclaims to the suit, which they subsequently amended, denying the 1st respondent's claim.

On 30th July 2007 the appellant applied principally, under Order VI Rule 13 (1), (a) (b) and (c) of the Civil Procedure Rules, to strike out the 1st respondent's amended plaint or alternatively, to dismiss the suit with costs. The application was based on the ground that the suit was scandalous, frivolous and vexatious because there was no nexus between the appellant and 1st respondent and also that it was *res judicata* and an abuse of the process of the court. The 1st respondent opposed the application vide a replying affidavit sworn on the 5th November 2007, after which the parties canvased the application by way of written submissions, which they adopted without oral highlighting.

After considering the application the learned judge held that the 1st respondent's claim raised triable issues and was neither *res judicata* nor frivolous or vexatious. He noted that this Court had, by a judgment in **Civil Appeal No. 128 of 1995** acknowledged the sale of the 1,000 acres, and that in any case the 1st respondent was not a party to that appeal. He accordingly dismissed the application with costs, prompting the appellant to lodge this appeal.

Although the appellant tabulated 11 ground of appeal, in his written submissions he compressed all of them into two only, contending that the learned judge erred by failing to find that the 1st respondent's amended plaint did not disclose a cause of action against the appellant and by failing to hold that the suit was *res judicata*.

Highlighting his written submissions, **Mr**. **Njenga** and **Mr. Njuguna**, learned counsel for the appellant, submitted that the trial judge erred by holding that the 2nd respondent had admitted that the 1st respondent purchased and was in occupation of the suit property whilst the 2nd respondent did not file any document or affidavit to that effect and did not make any representations in Civil Appeal No. 128/1995 with regard to the 1st respondent's claim. He also contended that the judgment of this Court did not indicate where the 1,000 acres sold to the 1st respondent were to be excised. On the authority of **Titus Mutuku Kasuve v. Mwaani Investments Ltd & 4 others [2004] eKLR,** the appellant submitted that as a beneficiary of the estate of the deceased, he had no capacity to be sued and further that the 2nd respondent did not have capacity to sell the property of the estate before it was distributed.

On *res judicata* the appellant submitted that what the 1st respondent was

seeking to enforce in his suit had already been determined with finality by this Court in CA No 128 of 1995. He relied on **Nicholas Njeru Mbeere v. Attorney General & 8 others [2013] eKLR** on what constitutes *res judicata***.** He also relied on **section 4** of the **Limitation of Actions Act**, and the case of **Willis Onditi Odhiambo v. Gateway Insurance Company Ltd [2014] eKLR,** in support of the contention that the 1st respondent's suit was filed fifteen (15) years after the execution of the contract, and was therefor time barred.

Mr. Melly, learned counsel who held brief for **Martin Munyu** for the 3rd respondent, supported the appeal contenting that this Court had determined with finality the issue of distribution of the estate of the deceased in CA No. 128 of 1995 and that the learned judge lacked jurisdiction to reopen a matter that had been concluded and was therefore *res judicata.* He added that if the 1st respondent had a claim, it could only lie against the 2nd respondent as the one who sold the land to him and further that there was no evidence that the Land Control Board had sanctioned the sale.

For the 4th respondent, **Mr. Mwangi Kigotho,** learned counsel, left the matter to the Court, stating that he was taking a neutral stance. Nevertheless he gratuitously added that he was convinced the 1st respondent's suit raised triable issues, which ought to go for trial.

Opposing the appeal, **Ms. Kilonzo**, learned counsel for the 1st respondent submitted that the 1st respondent was not party to the succession cause in the High Court which gave rise to CA No.128 of 1995 and that in the latter appeal, this Court held that the 2nd respondent had sold 1000 acres to the 1st respondent from LR Nos. 1756/7 and 1756/8, both measuring 9000 acres. Counsel added that was the reason why the court distributed the balance of 8000 acres among the three widows of the deceased, leaving out the 1st respondent's 1000 acres.

On *res judicata*, counsel cited the decisions in **Ngugi v. Kinyanjui** & **3 others [1989] eKLR** and **Kamau Gatibaru Nguyai v. Kamau Gatibaru Ngunayu & another [1976] eKLR,** in support of her contention that *res judicata* did not apply because the 1st respondent was not a party to CA No. 128 of 1995.

Secondly, she added, the 1st respondent's amended plaint was based on breach of a contract of sale, which was distinct from the succession dispute in Civil Appeal No. 128/1995 to which the 1st respondent was not a party.

On whether the 1st respondent had a reasonable cause of action against the appellant, counsel relied on the case of **Elizabeth Kamene Ndolo v. George Matata Ndolo [1996] eKLR** and submitted that his 1000 acres were in the land that was claimed or allocated to the appellant. The decisions in **Re Estate of Thing'o Nginyayu Muthiora (Deceased) [2013] eKLR;** and **Jeremiah Kamau Gitau & 2 Others v. Wandai & 5 others [1989] eKLR** were cited in support of the submission that the 2nd respondent, as an executor of the deceased's will, had power to sell the 1000 acres to the 1st respondent. Lastly, counsel relied on D**. T. Dobbie & Company (Kenya) Ltd v. Joseph Mbaria Muchina & another**, CA No. 37 of 1978 and submitted that the 1st respondent's claim raised triable issues and that the learned judge did not err in refusing to strike out or to dismiss the same.

Although duly served, neither the 2nd respondent nor her counsel appeared for the hearing of the appeal.

At the heart of this appeal is the question of exercise of discretion by the trial judge. This Court will not interfere with exercise of discretion by the trial court unless it has misdirected itself in law or in facts, has considered matters it should not have considered or has failed to take into account matters it should have taken into account, or its decision, albeit discretionary, is plainly wrong. (See **United India Insurance Company Limited v. East African Underwriters Kenya Ltd [1985] KLR 898).**

Starting with whether learned judge erred by holding that the suit raised triable issues, we must restate that the power to strike out pleadings is a drastic power to be exercised sparing and in the clearest of cases. In D**. T. Dobbie & Company (Kenya) Ltd v. Joseph Mbaria Muchina & another** (supra), it was emphasized that no suit should be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak to be beyond redemption by way of amendment. Additionally, if a suit shows a mere semblance of a cause of action, provided it can be injected with real life by way of amendment, it ought to be allowed to go to trial.

In this appeal, the 1000 acres claimed by the 1st respondent were part of the estate of the deceased; the 2nd respondent who sold them to the 1st respondent was a duly appointed executor of the will of the deceased; subsequently the 1st respondent took possession of the 1000 acres; in CA No. 128 of 1995 this Court excluded the 1000 acres sold to the 1st respondent by the 2nd respondent from the land that was available for distribution to the beneficiaries of the deceased; and when the deceased's estate was finally distributed, the 1st respondent's interest was not catered for. In these circumstances, it is difficult to see how the 1st respondent's suit seeking his 1000 acres can be said to be frivolous, vexatious or an abuse of the process of court.

With regard to *res judicata*, it is sufficient for us to reiterate that to constitute *res judicata* the issue in dispute in the former suit must be

directly or substantially in dispute between the parties in the latter suit; the former and the later suits must be between the same parties, or parties under whom they or any of them claim, litigating under the same title; and, lastly the court or tribunal before which the former suit was litigated was competent and determined the suit with finality. (See **Nicholas Njeru Mbeere v. Attorney General & 8 others** (supra); and **Kamau Gatibaru Nguyai v. Kamau Gatibaru Ngunayu** (supra)). The doctrine of *res judicata* seeks to ensure conclusiveness in legal proceedings and bars further legal proceedings based on the same issues(s) over the same subject matter between the same parties or their proxies.

Taking the foregoing in mind, we are satisfied that the 1st respondent's claim was not *res judicata*.

The upshot is that this appeal has no merit and is accordingly dismissed with costs to the 1st respondent. It is so ordered.

Dated and Delivered at Nairobi this 20th Day of December, 2018.

R.N. NAMBUYE

JUDGE OF APPEAL

M. WARSAME

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.