



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 322 OF 2014

BETWEEN

JAMES NJUGUNA CHUI APPELLANT

AND

JOHN NJOGU KIMANI RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at Nairobi, (Nyamweya, J.) dated 17th September, 2014

in

E.L.C. NO. 711 OF 2012)

JUDGMENT OF THE COURT

The only issue that falls for our decision in this appeal is whether the High Court (Nyamweya, J) erred by striking out the appellant's plaint filed before that court on account of being *res judicata*. The learned Judge had so ruled on an application by the respondent dated 25th April 2013 which was based on the following grounds;

- 1. THAT the suit herein is *res judicata*.**
- 2. THAT the issues and parties in the present matter are directly and substantially in issue in former suits of Kikuyu Land Tribunal LND/16/20/26/2003, Dr James Njuguna Chui & Francis Mungai Muiruri V John Njogu Kimani and Provincial Appeals Committee (Tribunal) Claim/Appeal No. 6 of 2004, Francis Mungai Muiruri v John Njogu Kimani.**
- 3. THAT the suit should be struck out as it is vexatious and an abuse of the process of the Court and a nullity *ab initio*.**
- 4. THAT it is in the interest of justice and for the determination of all the issues, in the application herein, on merit the orders sought should be granted.**

It was supported by an affidavit sworn by **Patricia Khisa**, the respondent's advocate in which she

deposed that in the year 2003 the appellant through his agent, one Dr. James Njuguna Chui, lodged a suit against the respondent before the Kikuyu Land Disputes Tribunal claiming that the respondent as owner of Title No. Kikuyu/Kikuyu Block 1/114 trespassed upon, interfered with beacons and encroached onto the appellant's adjoining land No. LR. Kikuyu/Kikuyu Block No. 1/113. That Tribunal after hearing the parties determined that the boundary between the two pieces of land had not been interfered with. Significantly, that award was read and adopted as a judgment of the Kikuyu Principal Magistrate's Court on 28th August 2004 under PMCC No. Misc. 5 of 2004.

As the appellant was unhappy with that decision and award, he lodged an appeal through his foresaid agent at the Provincial Land Disputes Appeals Tribunal which on 23rd April 2004 dismissed it and upheld the Land Disputes Tribunal award. Its decision that the borders between the two parcels had no problem was recorded and adopted as a judgment of the Principal Magistrate's Court on 5th June 2009. On that basis the respondent contended that the parties, subject matter and issue in contest between the two former suits and the one before the High Court were the same and therefore *res judicata*.

The respondent contended further that the appellant moreover did file and prosecute an application before the Kikuyu Senior Resident Magistrate's Court being Misc. Case No. 8 of 2004 in which he sought orders of injunction to stop the respondent from constructing on the respondent's aforesaid land. That application was dismissed and no appeal was preferred against that dismissal. The respondent therefore argued that the appellant was contend with that outcome and could not thereafter be allowed to re litigate the issue before the learned judge as that would be tantamount to harassing the appellant vexatiously and in abuse of the court process.

The appellant opposed that application by way of what he termed Grounds of Opposition/Notice of Preliminary Objection as follows;

- 1. THAT the affidavit in support of the application sworn by PATRICK (sic) KHISA ADVOCATE offends the Provisions of Order 19 and the general Rule that Advocates should not depone to matters of fact in a matter where they are representing a party, the same amounts to nothing but hearsay and is bad in law and paragraphs 3-22 of the said affidavit ought be struck off.***
- 2. THAT the issue of whether or not the suit is res judicata is an issue that should otherwise be addressed during the main hearing of the suit.***
- 3. The doctrine of res judicata does not apply herein as no competent court has tried and determined fully the issues between the parties herein. The Kikuyu Law Court only dealt with an issue of injunction and held that it did not have jurisdiction to deal with the matter and neither can handling of the dispute by a Land Dispute Tribunal that did not even have the jurisdiction to deal with the matter be deemed as res judicata.***
- 4. The application is otherwise frivolous, vexatious unmeritorious and ought be dismissed with costs.***

The learned judge considered the motion, the objections and the written submissions filed by the parties before rendering the impugned ruling which the appellant now challenges in his memorandum of appeal charging that the learned judge erred in, by way of summary and paraphrase;

- Failing to appreciate that the Kikuyu Resident Magistrate's Court merely endorsed the award by the LDT and not having heard the dispute could not invoke *res judicata*.**
- Failing to appreciate that some of the claims or prayers sought before her were not raised or dealt with by the Resident Magistrate's Court or the Land Disputes Tribunal.**
- Holding that the appellant was stopped from questioning the jurisdiction of the Land Disputes Tribunal**

- **Failing to appreciate that the Magistrate’s Court at Kikuyu had declared itself bereft of jurisdiction and not dealt with the issues between the parties.**
- **Allowing herself to be held hostage to technicalities and upholding the res judicata objection against evidence thereby defeating substantive justice.**

The appellant’s advocates, M/s Njenga & Co. Advocates elucidated on those grounds in their written submissions the thrust of which was that the Land Disputes Tribunal is not a court of competent jurisdiction within the meaning and intendment of **Section 7** of the Civil Procedure Act; the Magistrate’s Court merely adopted the decision of the Land Disputes Tribunal and did not therefore itself hear and determine the dispute between the parties; the subject land was registered under the Registered Land Act, Cap 300 and the Land Disputes Tribunal was therefore bereft of jurisdiction to entertain the dispute filed before it by the appellant.

The issue before the Land Disputes Tribunal was a boundary dispute while before the High Court the issues were different, to wit, damages for trespass, injunctions and mesne profits as seen from the prayers and; finally, it was draconian and against both the Constitution and the ‘oxygen principle’ for the judge to have struck out the appellant’s suit. Various authorities were cited in aid and we have considered them.

At the hearing of the appeal **Ms. Wachanga**, learned counsel for the appellant relied on those submissions as filed while **Mr. Nkonge**, her learned counterpart, addressed us orally. He stated that once a decision of the Land Dispute Tribunal is adopted by the Magistrate’s Court and a decree issued, that decision becomes a decision of the Magistrate’s Court capable of founding a plea of *res judicata*. He added that the appellant cannot be heard to challenge the very jurisdiction he had himself admitted by invoking it in filing the claim at the Land Disputes Tribunal. Counsel therefore besought us to dismiss the appeal.

In a brief rejoinder, **Ms. Wachanga** reiterated the submission that the Land Dispute Tribunal did not have jurisdiction to deal with trespass, which was filed before it; though it was competent to deal with boundaries. She contended that **Section 4** of the RLA

ousted the Land Disputes Tribunal’s jurisdiction by vesting the same in land registrars under **Sections 22** and **23**.

There is no magic about the term *res judicata*. Black’s Law Dictionary, which the appellant’s counsel cited, defines the term thus;

“Latin „a thing adjudicated? 1. An issue that has been definitively settled by judicial decision. 2. An affirmative defense barring the same parties from litigating a second Law suit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been-but was not-raised in the first suit. The three essentials are

1. an earlier decision on the issue,

2. a final judgment on the merits, and

3. the involvement of the same parties,

or parties in privity with the original parties...”

The rationale behind the rule is simple, there has to be an end to litigation and a person who has approached the courts and had his dispute decided must learn to live with it. It is not open to him to relitigate or reagitate the issue before the same or another forum in the hope of getting an improved or a better result. It is a pragmatic rule designed to stop vexatious litigants from pestering those with whom they have disputes and so it protects the other

party from the spectre of endlessly repetitive litigation hanging over their heads like the sword of Damocles. It also protects the court system from abuse such as would bring the administration of justice into disrepute not only by having the same decision pronounced over and over by the same or similarly situated courts but, worse, by having contradictory decisions emanating from the court or courts over the same issue, courtesy of the repeat litigation.

We reiterate, purely for emphasis, what this Court differently constituted (G.B.M. Kariuki, Kiage & Murgor JJ.A) stated in WILLIAM KOROSS vs. HEZEKIA KIPTOO KOMEN & OTHERS Eldoret Civil Appeal No. 223 of 2013, with which we respectfully

agree;

“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.

Speaking for the bench on the principles that underlie res judicata, Y.V. ChandraChud J in the Indian Supreme Court case of LAL CHAND Vs. RADHA KISHAN, AIR 1977 SC 789 stated

and we agree;

„The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.”

The principle of ***res judicata*** finds statutory expression in the peremptory exclusionary terms of **Section 7** of the Civil Procedure Act thus;

“No court shall try any suit or proceeding in which the matter in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”.

This Court in NGUGI vs. KINYANJUI & 3 OTHERS [1989] KLR 146 held that the said provision constitutes a statutory bar and an injunction against the relitigation of a matter already heard and finally determined by a competent forum. And so it is.

The appellant has attempted to go around that bar by stating that the decision of the Land Disputes Tribunal was not a decision of a court of competent jurisdiction and so ***res judicata*** cannot apply. With respect, he cannot be right. The Legislature in enacting the Land Disputes Tribunals Act, No. 18 of 1990 (repealed) created a special tribunals and conferred jurisdiction on them under **Section 3(1)** of the repealed Act to deal with certain matters. It is that very jurisdiction the appellant himself invoked through his duly authorized agent and that jurisdiction was neither objected to nor in any way impeached until the award of the tribunal was made, forwarded to the Kikuyu Magistrate’s Court and adopted thereby as the judgment of that court. The judgment found formal expression as a decree of the said magistrate’s court and the appellant challenged the verdict as required by way of appeal, but not on grounds of jurisdiction. We are in no doubt whatsoever that the Land Disputes Tribunal acted within its jurisdiction as statutorily conferred and that decision, as confirmed by the Provincial Land Disputes Tribunal on appeal, was determinative of the issue.

We think that it would be contrary to the legislative intent and public policy that informed the setting up of the Land Disputes Tribunals with clear jurisdiction and an express mode for the adoption of their

decisions and any appeals therefrom, were we to hold that the determinations were not possessed of the requisite finality that would bring *res judicata* into play.

We think therefore that the learned Judge was correct to hold that the Kikuyu Magistrates' Court having entered judgment in accordance with the decision of the Land Dispute Tribunal as required by **Section 7** of the repealed Act was a competent court within the meaning of **Section 7** of the Civil Procedure Act and that its adoption of the award clothed the said decision with both enforceability and finality.

The repealed statute at **Section 8(9)** had clear provisions as to how a party dissatisfied by an award by a Provincial Land Dispute Tribunal could challenge, it namely by way of an appeal to the High Court within stipulated timelines and on points of law only. In this case the appellant elected not to do so and it is impermissible that he should relitigate the issue finally determined through the kind of suit he filed before the High Court. The learned Judge was perfectly entitled to direct the beam of *res judicata* on the suit before her as prayed and her striking it out cannot be faulted.

The upshot of our consideration of this appeal is that it is devoid of merit. It is accordingly dismissed with costs.

Dated and delivered at Nairobi this 31st day of March, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR