



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL NO. 70 OF 2016

BETWEEN

JOHN OMOLO ORACHA.....1ST APPELLANT
GEORGE MWANYAMA MGHOI.....2ND APPELLANT
MARTINE OTIENO.....3RD APPELLANT
VALENTINE SAMBA MWALUNGA.....4TH APPELLANT

AND

KENYA PETROLEUM REFINERIES LTD.....1ST RESPONDENT
NATIONAL LAND COMMISSION.....2ND RESPONDENT
COUNTY POLICE COMMANDER.....3RD RESPONDENT
THE ATTORNEY GENERAL.....4TH RESPONDENT

(Appeal from the ruling and order of the Environment & Land Court at Mombasa, (Omolo, J.) dated 30th June 2016

in

ELCC Pet. No. 250 of 2015)

JUDGMENT OF THE COURT

The central issue for determination in this appeal is whether the Environment and Land Court (*Omolo, J.*) erred when she sustained a preliminary objection raised by the 1st respondent, *Kenya Petroleum Refineries Ltd*, and struck out the appellants' suit as *res judicata*.

On 26th September 2000, the 1st respondent filed Mombasa *High Court Civil Case No. 544 of 2000* against one *Hassan Ngoa* and *53 others, (defendants)* seeking, *inter alia*, an order for their eviction from

among other properties the property known as *MN/6/255/1* registered in its name and situated in the Port Reitz area of Mombasa County (***the suit property***). The 1st respondent pleaded that it was the registered owner of the suit property since 1st September 1960 and that it had laid under it three major pipelines for transportation of crude oil, refined oil and gas between Port Reitz and Changamwe.

In or about 1998 following the *El Nino* rains, the 1st respondent commenced repairs on the pipelines and was surprised to see that the defendants had invaded the suit property and built semi permanent structures thereon. Alarmed by the trespass to the suit property and the grave danger that the defendants were exposing themselves to by settling on land beneath which were pipelines transporting huge volumes of highly inflammable material, the 1st respondent made attempts to remove the defendants from the suit property through the local administration. When the efforts failed to yield fruits, it filed the suit in the High Court for their eviction.

The defendants filed a defence and claimed the suit property for themselves through adverse possession, pleading that they had been in open, notorious and peaceful occupation of the suit property since 1965. ***Odero, J.*** heard the suit and found that on a balance of probabilities that the defendants entered the suit property in 1998 as averred by the 1st respondent. Satisfied that the defendants could not sustain a claim to the suit property through adverse possession, the learned judge entered judgment in favour of the 1st respondent and issued an order for vacant possession in favour of the 1st respondent. She however ordered each party to bear their own costs.

Subsequently the defendants filed a notice of appeal and applied for stay of execution of the order for vacant possession. That application was heard and dismissed by ***Kasango, J.*** on 28th August 2014. Undeterred the defendants filed another application for stay of execution in this Court, which was also dismissed vide a ruling dated 20th March 2015. There is no indication whether the defendants ever pursued their intended appeal after failing to obtain an order of stay of execution.

After an interregnum of about seven months, the appellants in this appeal claiming to act on their own behalf ***and that of residents of Port Reitz, Mombasa County residing on the suit property and other properties of the 1st respondent***, filed a petition in the Environment & Land Court alleging violation of their rights and fundamental freedoms, among them the right to have their dignity respected (***Art 28***); the right not to be treated or punished in a cruel, inhuman or degrading manner (***Art 29***) the right to adequate housing and reasonable standards of sanitation, freedom from hunger and the right to adequate food, clean and safe water and education (***Art 43***); the right to property (***Art 40***) and the right to fair hearing (***Art 50***). The respondents to the petition were the 1st respondent, the National Land Commission, the County Police Commander and the Attorney General.

The appellants pleaded that their eviction from the suit property pursuant to the judgment of the High Court in HCCC NO. 544 of 2000 would be in violation of their said constitutional rights because they were not parties to the suit. Accordingly they prayed for, among others, a declaration that the orders of the High Court in HCCC No. 544 of 2000 were in violation of their constitutional rights and fundamental freedoms and therefore null and void; a permanent injunction to restrain their eviction from the suit property; an order that they be provided with alternative accommodation or compensation; in the event of an order of eviction, they be given one year's notice and opportunity to be fully heard on proposals for alternative settlement and accommodation; and that such eviction should follow the ***United Nations Basic Principles & Guidelines on Development Based Eviction and Displacement***.

In two affidavits sworn on 1st October 2015 in support of the petition and a Notice of Motion for conservatory orders, the 1st appellant, ***John Omolo Oracha*** deposed that he and the other parties he was representing with his co-petitioners had resided on the suit property for many years and that there were hundreds of them on the suit property. Whatever the appellants meant by "many years", it should be recalled that the High Court had found in its judgment dated 12th March 2013, which has not been set aside, that the suit property was in fact invaded in 1998 and not earlier.

Be that as it may, the 1st respondent responded to the petition by filing a notice of preliminary objection and grounds of opposition dated 6th October 2015 as well as a replying affidavit sworn on the same day by its legal counsel, **Kadzo Kalama**. It contended that the petition was *res judicata* in light of the judgment of the High Court in HCCC No 544 of 2000; that the court was *functus officio*; that the ELC had no jurisdiction to re-open the judgment of the High Court dated 12th March 2013; that the decision in HCCC No. 544 was a judgment *in rem*; that all the matters raised in the petition ought to have been raised in HCCC No 544 of 2000 and the same having not been raised are deemed to have been in issue; and that the petition, which purported to be a representative suit, was fatally defective for non compliance with the provisions of the Civil Procedure Rules.

That is the objection that was heard and sustained by Omolo, J., leading to this appeal. On the question whether the court was *functus officio*, the learned judge found the issue not to be relevant as the petition was not before the same court as HCCC No 544 of 2000. She however found the petition to be *res judicata*, the same issues raised in the petition having been determined in HCCC No. 544 of 2000.

In this appeal the appellants raised four grounds, which they crystallized into two in their submissions, namely whether the learned judge erred by entertaining the preliminary objection and whether the petition was *res judicata*. Relying on **Mukisa Biscuits Manufacturing Co Ltd v. West End Distributors Ltd [1966] EA 696**, and **Henry Wanyama Khaemba v Standard Chartered Bank (K) Ltd & Another, HCCC No. 335 of 2013**, the appellants contended that a preliminary point must be on a pure point of law and cannot be raised where facts have to be ascertained. They further argued that the facts in the petition were contested and could not be conclusively ascertained from the pleadings alone. In their view, the learned judge had to hear the petition first so as to ascertain the facts.

Regarding the issue of whether the petition was *res judicata*, while conceding that HCCC No 544 of 2000 and the petition related to the same suit property, they nevertheless maintained that the causes of action in the two suits were different and did not involve the same parties. The appellants cited the ruling of this Court in **Kenya Hotel Properties Ltd v. Willisden Investments Ltd & 6 Others, CA. No. 24 of 2012**, in support of the submission that two suits could involve the same property but still raise different causes of action, in which case *res judicata* would not arise.

The 1st respondent opposed the appeal, contending that the learned judge did not err in entertaining and upholding the preliminary objection and in holding that the petition was *res judicata*. On the authority of **Omondi v National Bank of Kenya Ltd & Others [2001] 1 EA 175** the appellant submitted that the issue of *res judicata* is a point of law that can properly be taken as a preliminary objection and in the instant case all that the learned judge needed to do was to look at the pleadings rather than ascertain any facts.

Citing **section 7** of the **Civil Procedure Act**, the 1st respondent contended that the petition was *res judicata* on account of the judgment in HCCC No 544 of 2000 which was heard and determined by a competent court and related to occupation of the suit property by a group of persons, residents of Port Reitz, on behalf of whom the appellants were litigating in the petition. Citing the decision of the Court of Appeal of Tanzania in **Lotta v Tanaki & Others [2003] 2 EA 556**, the 1st respondent submitted that the appellants are deemed to claim under the defendants in HCCC No 544 of 2000 because they had a common interest in the suit property.

Next the respondents urged that the judgment in HCCC No 544 of 2000 was a judgment *in rem* rather than *in personam* and that it bound all the world, including the appellants, as regards the ownership and title to the suit property.

The other respondents in this appeal, who we were informed did not take part in the proceedings before the trial court did not file any submissions.

We have anxiously considered this appeal. It is not disputed that a preliminary objection must be based on a point of law which has been pleaded or which arises by clear implication and if sustained may dispose of the suit. The facts on which it is based must not be facts that are contested or that require to be proved

by evidence. In *Aviation & Allied Workers Union Kenya v. Kenya Airways Ltd & 3 Others*, SC App. No. 50 of 2014, the Supreme Court stated:

“...a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

And in *IEBC v. Jane Cheperenger & 2 Others*, SC App. No 36 of 2014, that Court added:

“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”

The issue of whether the appellants’ petition was *res judicata* was pleaded. There can be no dispute that where the facts are not contested, *res judicata* is a question of law upon which a preliminary objection can be properly founded, for it bars the court hearing a matter that has been finally determined by a court of competent jurisdiction. Examples abound, including from the authorities cited by the parties in this appeal, of preliminary objections founded on the principle of *res judicata*.

Section 7 of the Civil Procedure Act, the provision upon the principle of *res judicata* is founded in this jurisdiction provides thus:

“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.” (Emphasis added)

The above provision is followed by a number of explanations, among them no. 4 which clarifies that any matter, which might or ought to have been made a ground of defence or attack in the former suit, is deemed to have been a matter directly and substantially in issue in such suit and no. 6, whose terms are that where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall be deemed to claim under the person so litigating.

In *Uhuru Highway Development Ltd v. Central Bank of Kenya Ltd & Others*, CA No 36 of 1996, this Court set out the prerequisites of a successful plea of *res judicata* as follows:

“In order to rely on the defence of res judicata there must be:

- (i) a previous suit in which the matter was in issue;***
- (ii) the parties were the same or litigating under the same title.***
- (iii) a competent court heard the matter in issue;***
- (iv) the issue has been raised once again in a fresh suit.”***

As to the philosophical considerations why the law recognises the principle of *res judicata*, the same were succinctly articulated by this Court in *William Koross v. Hezekiah Kiptoo Komen & 4 Others*, CA. No. 223 of 2013 as follows:

“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.”

In this appeal the plea of *res judicata* was pleaded and it is common ground that the dispute in HCCC No, 544 of 2000 involved the 1st respondent and persons in occupation of the suit property and a contestation as to the ownership and right of occupation of the suit property. In the petition, the appellants are claiming to be acting in the interest of and for the benefit of persons in occupation of the suit property. In terms of explanation no. 6 to section 7 of the Civil Procedure Act, the appellants claim interest in the suit property in common for themselves and other persons in occupation of the suit property. Accordingly all persons interested in the suit property as occupiers, including the parties in HCCC No. 544 of 2000, are deemed to be claiming or litigating under the appellants.

The appellants contend further that the cause of action in HCCC No 544 of 2000 is different from the cause of action in the petition. In our view, the short answer to that lies in explanation no. 4 to section 7 of the Act. By dint of that provision, any matter, which ought to have been raised in HCCC No. 544 of 2000 is deemed to have been a matter directly and substantially in issue in that suit. The appellants and the persons now claiming under them ought to have raised all the issues in the petition in the earlier suit, even if it meant applying to amend the suit for that purpose. In ***Henderson v. Henderson (1843-60) All ER 378***, the Court of Chancery stated thus, regarding the need for parties to bring forward their entire claims:

“...Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

We would agree too with the first respondent that the judgment in HCCC No 544 of 2000 was a judgment in *rem*, which is binding on, and effective against the whole world as regards ownership of the suit property. (See ***Kamunyu & Others v. Attorney General & Others [2007] 1 EA 116***). Justice Manikumar of the High Court of Judicature, Madras, explained the distinction between a judgment in *rem* and a judgment in *personam* thus in ***C. L. Pasupathy v. The Engineer in Chief & Another, WP. No. 3002 of 2007***:

“...judgment in rem operates on a thing or status rather than against the person and binds all persons to the extent of their interest in the thing, whether or not they were parties to the proceedings. The judgment “in rem”, as distinguished from judgment in “personam” is an adjudication of some particular thing or subject matter, which is the subject of controversy, by a competent tribunal, and having the binding effect of all persons having interests, whether or not joined as parties to the proceedings, in so far as their interests in the “res” are concerned.”

We are not persuaded that in the circumstances of this the trial judge erred in finding that the petition was *res judicata*. Accordingly this appeal is dismissed but in the circumstances of the case, we make no orders on costs. It is so ordered.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR