IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU & KIAGE, JJ.A)

CIVIL APPEAL NO. 192 OF 2014

BETWEEN

GRACE WAITHERA MUNIU……..…… APPELLANT

VERSUS

TERESIA WAINANA……..…1ST RESPONDENT

KIMANI WAINANA…….…..2ND RESPONDENT

(An appeal from the ruling and decision and order of the High Court of Kenya at Nairobi Githumbi J made on the 22nd day of November, 2013)

in

High Court Milimani ELC No 635 of 2013)

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JUDGMENT OF THE COURT

On 20th May, 2013 Grace Waithera Muniu (appellant) filed suit before the Environment and Land Court (ELC) Nairobi against Teresia Wainaina and Kimani Wainaina 1st and 2nd respondents, respectively. The appellant filed the said suit in her capacity as the administrator of the estate of her husband, the late Muniu Githua. The claim was over Land Reference No. Dagoretti/Kangemi/T. 341 (suit property) which land the appellant contended was purchased by her late husband in 1960 from one Oswell Ritho Mahiira at a cost of Ksh 1,600/-. Upon purchasing the land, it was not transferred to the appellant until 1988 when the original owner was compelled by a court order in **HCCC NO. 626 of 1969** to effect the transfer in favour of the appellant's husband. It is further alleged by the appellant that, upon demise of her husband in April 1974, the late Peter Wainaina Kamiti, the husband and father of the 1st and 2nd respondents respectively staked a claim over the same title by filing a claim in **HC MISC. 662 OF 1989 (OS).**

According to the appellant, the said Peter Wainaina Kamiti who was a cousin to her late husband died in 24th August, 2001 and therefore the said suit abated one year after his demise on 24th August 2002. The appellant alleged that the respondents destroyed a residential property within the suit property on or about 23rd May, 2013 and attempted to construct a house on the suit premises. It is for that reason the appellant filed the suit before the ELC being No. 635 of 2013. In the suit the appellant was seeking an order of

permanent injunction to restrain the respondents from interfering in any way with the suit land. They also sought a mandatory order compelling the respondents to vacate the suit land.

The respondents reacted to the above suit by filing a notice of preliminary objection seeking to strike out the appellants' suit on the grounds that;-

> **"The suit herein and the motion dated 28th May, 2013 are *res judicata* in view of the fact that the issues raised in this suit were raised and have already been decided on in HCC No 662 of 1989 (OS). The suit and the application are an abuse of the court process."**

Parties agreed the preliminary objection be heard and determined by way of written submissions which were duly filed and considered by the learned trial Judge Gitumbi J. By the ruling delivered on 22nd November, 2013 which is the subject matter of the instant appeal, the appellant's suit was dismissed on the grounds that it was *res judicata*. We shall revert to the said ruling in some of the preceding paragraphs of this judgement.

Dissatisfied with the said outcome, the appellant filed the instant appeal which is predicated on the following grounds of appeal which were argued together by Mr Jaoko, learned counsel for the appellant. We will summarize them thus;

> The learned Judge erred in law by;-
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> 1. Finding that the judgment was entered by a court of competent jurisdiction in Nairobi HCCC No 662 of 1989 (OS) between the appellant and the 1st respondent.
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> 2. Holding that by dint of Order 46 **Rule 18 (1) (c)** of the Civil Procedure Rules, leave granted in HCCC No 662 of 1989 (OS) operated as a stay of proceedings and/or a stay of proceedings and thereby withheld the entry of judgment in the said former suit.
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> 3. By finding that all parties have conceded that the respondents are acting in their capacity as the legal representatives of the deceased person, the late Peter Wainaina Kamiti.
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> 4. Failing to consider issues raised in the appellant's pleadings, written submissions and judicial authority in the case of NGUYAI Versus NGUNAYU (1985) KLR Pages 606 to 617.
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> 5. Failing to find the respondents' claim of one-half (½) share of ownership of the suit property known as Land Reference No. Dagoretti/Kangemi/T34 had lapsed and/or was not tenable under **Section 10** of the Limitation of Actions Act (Chapter 22 of the laws of Kenya) and to that extent the doctrine of r*es judicata* was inapplicable with regard to the appellant's subsequent suit.

During the hearing of this appeal, Mr Jaoko, learned counsel for the appellant elaborated on the aforesaid grounds; he submitted that under **Section 7** of the Civil Procedure Act, what constitutes *res- judicata* in law is set out; that is whether an issue is directly in issue as it was in a previous suit; whether the suit was between the same parties, and lastly whether a court of competent jurisdiction determined the previous suit. In his view, **HCCC No 662 of 1989** was not concluded by a court of competent jurisdiction; it was referred to arbitration in 1991, an award was made by a panel of elders which was not presented to court for adoption as a judgment of the court. Thus the suit was not fully determined with a final judgement. Although the Tribunal of elders was competent the adjudication was not completed as the award was never adopted in court. Thus the matter was not *res judicata.*

Counsel for the appellant further submitted, since the application by way of notice of motion that was filed by the appellant seeking to set aside the award by the elders tribunal dated 14th July 1992 was dismissed; the claim being advanced by the respondent over ownership of land lapsed after 12 years as it was not enforced within the time provided under **Section 7** of the Civil Procedure Act; since the award was not enforced the respondent claim for a share of the suit property lapsed. The learned Judge was also

faulted for failing to recognize there was a fresh cause of action when the respondents threatened to demolish the appellant's property which was the cause of action in **ELC No 635 of 2013**. For the aforesaid reasons, counsel for the appellant urged us to allow the appeal.

Mr Amuga, learned counsel for the respondent opposed the appeal, firstly by pointing out the appeal was filed out of time; the proceedings were collected from the registry on 14th May, 2014, which means this appeal ought to have been filed on 14th July, 2014 but instead it was filed on 25th July, 2014 without first obtaining leave of Court. The respondent duly filed an application on 20th August, 2014 within the period of 30 days as provided under **Rule 84** of the Court of Appeal Rules seeking to strike out the appeal on the grounds that it was incompetent, but the Court directed the issue of the competency of the appeal be raised within the appeal. Counsel urged us to strike out the appeal on the grounds that it was incompetent.

On the merit of the appeal, Mr Amunga supported the ruling of the learned Judge, which he submitted was properly anchored on **Section 7** of the Civil Procedure Act which bars parties from opening a matter that was determined by a court of competent jurisdiction. The appellant filed a notice of motion before the High Court seeking to set aside an award by the elders Tribunal which was dismissed and an order of stay was issued to stop the respondents from executing the award as the appellant was preparing to file an appeal; and subsequently, the appellant filed a notice of appeal with leave of the court. Since the appellant had filed an appeal under **Order 46 Rule 18** of the Civil Procedure Rules, the respondent could not move the High Court to adopt the award of the elders Tribunal as per the aforesaid order.

Counsel further submitted the suit property was occupied by both families of the appellant and respondents for decades; **HCCC No 622 of 1989 (OS)** sought a declaration that it be shared equally between the families of Peter Kamiti (respondent) and Waithera Muniu (appellant), the matter was referred to arbitration with the consent of both parties and the Tribunal found in favour of the respondent; the appellants' application to set aside the award of the Tribunal was dismissed. The appellant filed an appeal against the said order; therefore she cannot file a different suit seeking the same orders that touch on occupation of the suit property, as that is an abuse of the court process. Counsel urged us to dismiss the appeal also on merit.

Having regard to the grounds of appeal, the evidence before the trial court and the submissions made before us, we have formulated the following issues for determination in this appeal;

1. Whether the appeal is incompetent having been filed out of time without leave of the court.

2. Whether the suit, ELC No 635 of 2013 was *res judicata.*

3. Whether there was a new cause of action as presented in ELC No 635 of 2013 which were different from HCCC No 622 of 1989.

4. Whether the order by the Tribunal lapsed after it was not made an order of court after 12 years.

We will deal with the competency of the appeal first. On 20th August, 2014, the respondent filed a notice of motion seeking to strike out the appeal lodged on 25th July, 2014. This was on the grounds that the appeal was lodged outside the 60 days stipulated in the Court Rules after the proceedings were availed to the appellant on the 14th May, 2014. This motion was brought pursuant to the provisions of **Rule 84** which provides as follows;-

> **"A person affected by an appeal may, at any time, either before or after the institution of the appeal, apply to the court to strike out the Notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has been taken within the prescribed time.**
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> **Provided that an application to strike out a notice of appeal or an appeal shall not be**

brought after the expiry of thirty days from the date of the service of the notice of appeal or record of appeal as the case may be."

It is evident the appeal was filed outside the period of sixty days that is provided for under **Rule 82 (1)** of the Court Rules which provides;

"Subject to Rule 115, an appeal shall be instituted by lodging in the appropriate registry within sixty days of the date when the notice of appeal was lodged."

Time within which the appellant was required to file the appeal begun running on 14th May, 2014 when the appellant collected and paid for the certified copies of the proceedings, and time must have lapsed after sixty days on the 14th July, 2014. This is clearly stated in the certificate of delay issued by the court registry, that certified proceedings were collected on 14th May, 2014. To compound matters for the appellant, she did not file any replying affidavit to offer any explanation regarding the delay in filing the appeal out of time without leave of Court. However in a brief rejoinder, Mr Jaoko for the appellant justified the filing of the appeal late by stating that he obtained the certificate of delay on 11th June, 2014. Nonetheless, there is no explanation by counsel for the appellant why he obtained certified copies of proceedings on 14th May, 2014 and delayed in obtaining the certificate of delay which was obtained on 11th June, 2014.

A certificate of delay is meant to clarify when the certified copies of proceeding were availed by court because without proceedings, an appeal cannot be filed. In this case, there is no explanation by learned counsel for the appellant why he delayed in filing the appeal having collected the certified proceedings from 14th May, 2014. Even if one were to assume he was waiting for the certificate of delay, he also had it from 11th June, 2014 which is almost 30 days to 14th July, 2014 when he finally filed the appeal. Counsel had time even after obtaining the certificate of delay to file the appeal within time but no explanation is offered for failing to follow the rules. There being no explanation that was offered for this dilatoriness, and no leave having been sought as per the Court Rules to extend time, this appeal was filed out of time, and is therefore incompetent.

In arriving at the above conclusion, we have, as we should, taken note of the overarching objective in the administration of justice as provided for under Section 1 A and 1 B of the Appellate Jurisdiction Act and indeed under **Article 159** of the Constitution which gives unfettered authority to court to overlook procedural technicalities that impede delivery of substantive justice. We have nonetheless come to the conclusion that since the instant appeal was filed out of time, without the leave of court; it goes to the jurisdiction of the court. It is trite that a court has jurisdiction to entertain appeals filed within the time provided/or appeals filed out of time with leave of the Court. Thus, in our view, even the overarching objectives in the administration of justice cannot aid the appellant because a proper appeal was not filed which is the premise upon which the jurisdiction of the court starts. This appeal is therefore incompetent, but before we pen off, we have to deal with the other issues which were argued before us on merit.

The issues were, whether the matter was *res judicata* on the grounds that **HCCC No 662 of 1989 (OS)** was filed by Peter Wainaina Kamiti who was succeeded in title by the two respondents. In that suit, the respondents sought a determination that **Plot No. Dagorretti/Kagemi/T.341** be shared equally between them and the appellant; this claim of ownership was by virtue of the fact that the respondents were in continuous and uninterrupted occupation of the said portion for over a period of 12 years by virtue of **Sections 13** and **38** of the Limitation of Actions Act. There was also a prayer for transfer of the half share and an order restraining the appellant or her personal representatives or successors from interfering with the suit property. Both parties agreed by consent to refer the matter for arbitration by a panel of elders. It is common ground both parties participated in the arbitration proceedings and an award was made on 14th June, 1992 to the effect that the suit plot belonged to both appellant and respondents in equal shares. The respondent was ordered to refund a sum of equivalent to Ksh 6,500/- to the appellant being the sum the appellant had paid the family of Ritho who were the original owners.

Being dissatisfied with the said award, the appellant filed an application in the same suit in the High

Court on 13th August, 1992 seeking to set aside the award. That application was heard by Osiemo J., and was dismissed on 26th June, 2008. It is indicted the appellant obtained leave to file an appeal and proceeded to file a Notice of Appeal against the orders of 26th June 2008. Instead of prosecuting that appeal, the appellant filed on 26th May, 2013 another suit seeking a permanent injunction to restrain the respondents from taking possession, occupying and/or disposing the suit property; a mandatory order compelling the respondents to vacate the suit land and lastly that the order be enforced by the local police. This matter was simultaneously filled with an interlocutory application for interim orders pending the determination of the main suit.

The above application is the one that provoked a preliminary objection filed by the respondent stating the matter was *res judicata*. Githumbi J., who heard the objection considered the guiding principles in determining the application based on the doctrine of *re judicata*. In considering the matter, the learned Judge restated the provisions of **Section 7** of the Civil Procedure Act and duly examined the three conditions that guide the determination of whether the matter was *res judicata* as alleged by the respondents. This is how the learned Judge dealt with the said conditions in a pertinent portion of the said ruling which is reproduced here below;-

> **"(1) Was there a former suit or issue decided by a competent court? The question that has arisen is whether this dispute can be said to have been decided by a competent court owing to the fact that judgment was not entered according to the award in the former suit. On that point, I refer to Order 46 rule 18 (1)**
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> **(c) which states that the court shall, on the request of any party with due notice to other parties enter judgment according to the award when an application, inter alia, to set aside the award has been heard and no leave to appeal against such refusal has been granted within 14 days of such refusal. In this particular case, the plaintiff filed an application to set aside the arbitral award and when the same was dismissed, she sought and was granted leave to appeal against the refusal. Clearly, it is the intended appeal of the plaintiff that is holding the entering of judgment in the former suit in accordance with the arbitral award. For my purposes, I find that there was a former suit in which the issue under contention herein was decided by a competent court.**
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> **2. Was the matter in dispute in the former suit between the parties directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar? On this point, all parties have conceded that the subject matter of this suit which is the suit property is also the same subject matter of the former suit, this condition is also satisfied.**
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> **3. Are the parties in the former suit the same parties, or parties under whom they or any of them claim, litigating under the same title? It is also conceded by the parties that the parties in this suit are the same parties in the former suit because the defendant/respondents are acting in their capacity as the legal representatives of the deceased, who was the plaintiff in the former suit and the plaintiff/applicant was the defendant in the former suit.**
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> **Overall, the 3 conditions set out above have all been met and I therefore find that his present suit is indeed res judicata."**

We have reproduced the above analysis to demonstrate that we have examined each and every reasoning by the Judge as well as the background information, this being a first appeal as set out in the oft' cited case of ***Selle vs. Associated Motor Boat Company (1968) E.A. 123 at page 126***, where the Court of Appeal held:-

> **"…….. this Court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect…"** See **Jivanji vs. Sanyo**
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> **Electrical Company Ltd. (2003) KLR 425".**

We agree with the learned Judge and we think this was not contentious that the dispute was over a parcel of land known **as Dagoretti/Kagemi T. 341.** This was an issue germane in both suits, that is, **HCCC No 662 of 1989 (OS)** and in

ELC No. 635 of 2013. In the earlier suit, the dispute was referred to arbitration through consent of both parties. Both parties were heard, and an award determining how the suit property was to be shared was made on the 14th July 1992. The appellant unsuccessfully applied before the High Court to set aside the award. Upon the dismissal of the application to set aside the award, the appellant was granted leave to appeal. It is also common ground that the parties were the same and the matter was decided by a competent tribunal on behalf of the High Court as the parties agreed by consent to go the arbitration way.

Thus, in our humble view, the learned Judge was spot on in analysing the three conditions that are requisite before establishing a matter is *res judicata.* The doctrine of *res judicata* which is indeed a principle of law has been applied in a number of cases including **Uhuru Highway Development Ltd Vs Central Bank & 2 Others** Civil Appeal No. 36 of 1996 where the three conditions were restated

as thus;

a. The matter must be directly or substantially in issue in the two suits.

b. The parties must be the same or parties under whom any of the claim, litigating under the same side, and

c. The matter must have been finally decided in the previous suit.

We find those three conditions were met in this matter, the appellant was trying to have a second bite of the same cherry when she filed **ELC No 635 of 2013** while hanging on the straw that the award issued in **HCC No 662 of 1989 (OS)** lapsed and by failing to disclose that she sought and was granted leave to appeal against the orders of Osiemo J. Further the learned Judge rightly concluded that once leave to appeal was granted under **Order 46 Rule 18 (1) (c),** there was no way the same High Court Judge could have adopted the award of the tribunal as the judgment of the court until the appeal was out of the way. We agree with the learned trial Judge, that the implementation of the award was frozen by the said order of leave and the appellant by failing to prosecute the appeal cannot now turn around and be heard to say the award lapsed. To further demonstrate the appellant was merely approbating and reprobating at the same time, there was no prayer in the subsequent suit to declare the award, void and unenforceable due to passage of time.

For the aforesaid reasons, we find this appeal devoid of merit as well as having had no leg to stand on as in the first place, it was filed out of time without leave of the court. In the upshot, the appeal is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 23rd Day of June, 2017.

M. K. KOOME

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JUDGE OF APPEAL

H. M. OKWENGU

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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