IN THE COURT OF APPEAL

AT NYERI

(CORAM: G.B.M. KARIUKI, SICHALE & KANTAI, JJA)

CIVIL APPEAL NO. 90 OF 2016

BETWEEN

FREDRICK WACHIRA NDEGWA

SUBST.OF (DECEASED) NDEGWA WACHIRA.……...….APPELLANT

AND

ATTORNEY GENERAL…….....….1ST RESPONDENT

BEAUTAH KANYORA MUTHUI….....2ND RESPONDENT

(An Appeal from the ruling of the Environment and Land Court of Kenya at Nyeri (Waithaka.J.) dated 12th July, 2016

in

ELC NO. 644 of 2014

****

JUDGMENT OF THE COURT

This is an appeal against the ruling of Waithaka, J. delivered on 12th July 2016 wherein the learned Judge found the suit to be ***res judicata***. Fredrick Wachira Ndegwa (hereinafter **"Fredrick**" or "the appellant"), has been on an endless legal journey which has taken him over 30 years in the magistrates court, the High Court of Kenya and this court. This is the appellant's fourth trip to this court raising the same issues and this seems to defy the doctrine of finality of litigation.

The genesis of the dispute before the lower courts is ***Nyeri Senior Resident Magistrate's Civil Case* No. 157 of 1979**. The Plaintiff in the said suit was ***Ricarda Wanjiku Ndanjeru*** ("Ricarda") while ***Ndegwa Wachira*** ("Wachira") was the defendant. In her amended plaint Ricarda averred that she was the widow of ***Ndanjeru Wachira***, who died sometime in 1961. He was the brother of Wachira. The subject of the suit was all that parcel of land known as ***Tetu/Unjiru/172***, which was registered in the name of Wachira. Ricarda averred in her amended plaint that the said piece of land was the product of the consolidation of several fragmented parcels of land some of which were owned by her deceased husband and others by Wachira. For some reason the said property was registered in the name of Wachira to the exclusion of Ricarda's husband. Ricarda's claim was for an order sub-dividing the land into two so that one of the

resultant parcels would be registered in her name on behalf of her deceased husband, alleging that the defendant was holding that portion on his behalf.

The subordinate court referred the dispute to arbitration under the then ***ORDER XLV*** of the Civil Procedure Rules. The matter was heard by a panel of elders who ruled in favour of Ricarda and the award was filed in court. Wachira, being aggrieved by that award unsuccessfully applied to set aside the said award. Upon failing to set aside the award he filed ***High Court Civil Appeal No. 10 of 1981*****,** an appeal against the decision of the Senior Resident Magistrate's Court. The High Court dismissed his appeal in a judgment delivered on 11th May 1982. Aggrieved once more by the decision of the High Court, Wachira filed an appeal to this Court, being ***Civil Appeal No. 44 of 1984*****.** In a judgment delivered on 5th October 1987, this Court found that the judgment of the subordinate court was entered prematurely as the 30 days provided under ***ORDER XLV RULE 16*** of the then **Civil Procedure Rules** had not expired and allowed the appellant 30 days within which to bring proceedings in the Senior Resident Magistrate's Court for setting aside the award under the said Order.

Wachira made an application at the Senior Resident Magistrate's Court to set aside the award as ordered by this Court. The Senior Resident Magistrate's court found nothing in the proceedings before the arbitrators constituting any misconduct or bias and dismissed his application in a **ruling** dated **22nd September 1993**.

The dismissal of the application by the trial magistrate triggered another appeal to the High Court being ***High Court Civil Appeal No. 2 OF 1994*****.** While the appeal was pending hearing Wachira died. He was substituted by his son, Fredrick. When the appeal came for hearing it was summarily dismissed by Angawa, J. on 4th October, 1994, pursuant to the provisions of **Section 79 B** of the **Civil Procedure Act**. It appears from the record that no appeal was filed thereafter. Instead, Fredrick filed an application for review of the order dismissing his appeal summarily. His application for review was similarly dismissed by Osiemo J. on 10th June 1996. Fredrick filed an appeal against the said decision in this Court vide **Civil Appeal No. 149 of 1996** which was dismissed on 18th October 1996. The main reason for dismissal of his appeal was that the suit land had already been sub-divided and the portion which had been given to Ricarda had already been transferred, the same to ***Beautah Kanyora Muthui*** (hereinafter "**Muthui"** and the 2nd Respondent in this appeal) who was not a party to the appeal and it was not just to make an order which would radically affect his interest.

Undaunted, Fredrick filed a suit in the High Court for an order of subdivision namely ***High Court Civil Appeal No. 300 of 1996*** naming Ricarda and Muthui as 1st and 2nd defendants respectively. He prayed, inter alia for an order of declaration of trust and transfer of land to him. In a ruling dated 18th November 1996, Osiemo J. found the suit to be *res judicata* and struck out the whole suit. The learned judge went further to hold that the applicant would not be allowed to revive the same in any other court whatsoever.

Dissatisfied by the said ruling, the appellant lodged a Notice of Appeal contemporaneously with an application for stay under Rule 5 (2) (b) of this Court's rules, leading to the grant of what the Court perceived to be an injunction on 24th January 1997. In the meantime, Ricarda died and an application was made to substitute her with her son, ***Ignatious Ndegwa Ndajeru*** ("**Ignatious").** It appears no appeal was filed. Subsequently, the appellant made an application in the High Court to review the ruling by Osiemo, J. which found his suit *res judicata* in an application dated 29th November 2004. The same was dismissed by Khamoni J. on 16th May 2015. Unfazed, he filed an appeal in this Court, namely ***Civil Appeal No. 306 of 2005*** wherein a detailed account of this dispute was rendered by this Court followed by an affirmation of the High Court's finding that ***High Court Civil Case No. 300 of 1996*** concerned a matter which was *prima facie res judicata*. It dismissed the appeal on 8th July 2011.

The dispute has proved to be resilient and so have the parties. In spite of all the above rulings, Fredrick filed a fresh suit at the Environment and Land Court at Nyeri vide ***ELC No. 644 of 2014*** now the subject matter of this appeal. The estate of Ricarda was not named as a Defendant therein probably because land parcel No. ***Tetu/ Unjiru/ 172*** had already been subdivided into ***Tetu/Unjiru/891*** and ***Tetu / Unjiru/892***

respectively. ***Tetu/Unjiru/891*** had long been transferred to Muthui. The 1st defendant was the District Land Registrar, Nyeri (hereinafter "Land Registrar') who was accused of forging the title to ***Tetu/Unjiru/891***. Muthui, the registered owner of ***Tetu/Unjiru/891*** was named as the 2nd defendant. The plaintiff in that suit (Frderick) sought judgment against the defendants for inter alia, general damages for suffering inflicted on him on account of the alleged tortious acts of the defendants.

The defendants (Respondents in this appeal) in their Statement of Defence dated **25th February 2013** denied the various allegations of wrong doing levelled against them. In his defence, Muthui raised a preliminary objection contending that the suit was *res judicata,* as **SRMCC No. 157 of 1979 and HCCC No. 300 of 1996** had dealt with the matters which were now in issue, with a conclusive determination thereof rendered. When the matter came up for hearing, directions were issued to the effect that the preliminary objections be disposed of first by way of written submissions. Only Fredrick and the Land Registrar who was represented by the office of the Attorney General filed written submissions.

The Attorney General submitted in that suit that there were previous proceedings touching on the suit property and submitted that the suit as filed was *res judicata*. Reference was made to ***HCCC No. 300 of 1996, Civil Appeal No. 15 of 1997, Court of Appeal Civil Appeal Case No. 306 o 2005*** and ***SRMCC No. 157 of f1979*.** The learned Judge of the court appealed from analyzed the dispute by referring to the facts and history of the dispute as set out in ***Nyeri Court of Appeal No. 306 Of 2005*** and rendered herself thus:-

> ***"It is clear from the above determination of the Court of Appeal that the dispute brought before this court has been subject of determination in courts of competent jurisdiction to hear and determine it. Both the High Court and Court of Appeal have made their views concerning the plaintiff's claim to the suit property known to the Plaintiff. Whilst the plaintiff is entitled to hold his views concerning those determinations, he should realize that disputes preferred in a court of law, are determined in accordance with the law and procedure applicable to such disputes".***

The suit was found *res judicata* and dismissed. Fredrick was aggrieved by the ruling and filed a memorandum of appeal to this Court containing 25 homemade grounds of appeal dated 30th November 2016. The same appears to us to be an account of the dispute as opposed to grounds of appeal as we know them. The grounds of appeal as framed resemble a plea for help following the experience which the appellant has undergone in the corridors of justice. He can be excused and we hereby do so as he is a lay man in law; nonetheless, our focus turns on the grievances which have come through the said grounds of appeal. The appellant has spared no effort in recounting all the previous suits he has filed in the subordinate court, the High Court and all the way to this Court, expressing his dissatisfaction with the respective findings.

The appeal came for hearing before us on 17th July 2017. The appellant and the 2nd Respondent appeared in person, while 1st respondent (Land Registrar) was represented by Mr. Gisimba, learned counsel from the office of the Attorney General. The appellant began by re-organizing his grounds into 4 clusters, giving a detailed history of the dispute as he submitted and attempted to relate his perceived denial of justice to violation of **Articles 40(6)** and **156(6)** of the **Constitution of Kenya (2010)**. He submitted that the learned judge of the superior court erred by finding that ***ELC No. 644 of 2016*** was *res judicata* while ***SRMCC No. 157/1979*** has never been heard. However, what we discern from the said grounds of appeal and his oral submissions is that the appellant is under the impression that ***SRMCC No. 157 of 1979*** has never been heard and determined by the court. He also understood the orders of this Court in ***Civil Appeal No. 44 of 1984*** to mean that ***SRMCC No. 157 of 1979*** was to be heard *de novo* and failure to hold as such by the subsequent courts including this Court has denied him justice.

Mr. Gisimba for the 1st respondent submitted that the grounds of appeal were indecipherable and chose to rely on his submissions at the trial court. The 2nd Respondent, Mr. Muthui opposed the appeal by stating that the dispute has long been concluded having been heard by the courts below and this Court. He submitted that the Appellant had not been successful in those suits.

In our considered view and going by the number of cases we have set out hereinabove and the long

history of the matter we can do no better than restate what this Court stated in ***Civil Appeal No. 44 of 1984*** *and reiterated in* ***Civil Appeal No. 306 of 2005***

> ***"The appellant believes mistakenly though, that when this court allowed Civil Appeal No. 44 of 1984, it meant that the trial court was to start the case de novo. Nay. The decision meant that the trial court was commanded to allow the unsuccessful party in the arbitration an opportunity to challenge the award which had been filed. Under the relevant rules, the party had 30 days within which to challenge the arbitration award, which she did not do. It meant that the successful party had the right which he exercised, to move the court for judgment in terms of the award. That was the law, and it is not being alleged that it was not followed. If the appellant or the person he now represents failed to move the court to set aside the arbitration, if there was a basis for it, he should not blame any other person, except himself for that lapse. It is on the basis of a judgment entered pursuant to the elders' award that the suit land was sold to the 2nd respondent, and as he rightly submitted before us, he was a purchaser of the suit land for value. It has not been alleged that he was not an innocent purchaser for value."***

This Court went further to express itself with regard to the appellant's perceived denial of justice as follows:-

> ***"…we sympathize with the appellant because he must have been misled not to challenge the second judgment which was entered in terms of the arbitration award. Instead of doing that he filed a fresh suit to wit, Civil Case No. 300 of 1996 which to our mind concerned a matter which was prima facie res judicata or if not it was doomed to fail in view of what we have stated above…."***

In ***The Independent Electoral & Boundaries Commission – V- Maina Kiai & 5 Others-Civil Appeal No. 105 of 2017***, this Court laid down the elements which must be satisfied for a plea of *res judicata* to stand. The court expressed itself as follows:-

> ***"Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, 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 substantively 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".***

The court went further to state in the ***Maina Kiai*** case (supra) that:-

> ***"….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 parties- because it is the court itself that is debarred by jurisdictional injunct, from entertaining such suit.."***

Accordingly, we find and hold that this dispute ended on 18th October 1996 when a differently constituted bench of this Court in ***Civil Appeal No. 149 of 1996*** dismissed the appeal by the appellant. This Court made a finding that the suit land had already been subdivided and the portion which had been given to Ricarda had been transferred to the 2nd Respondent who was not a party to the appeal. This Court

declined to make an order which would have radically affected the interest of the 2nd respondent. This Court is not at liberty to set aside or review its own judgment and re-open litigation for further agitation in circumstances as exist in the appeal before us.

Section 7 of the **Civil Procedure Act, Cap 21** Laws of Kenya, prohibits a court from trying any suit or issue in which the matter directly and substantially in issue has been directly and substantially been dealt with 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 suit in which such issue has subsequently been raised, and has been heard and finally decided by such court. The learned Judge of the trial court rightly considered this provision of law and found the suit to be *res judicata*. The issues have been heard and finally determined by courts of competent jurisdiction. This Court has expressed itself on this matter 3 times and this is the fourth time. The appellant feels aggrieved on issues that have finally been determined and the law will not allow or countenance his actions which amount to an abuse of the process of the court. The appellant has been moving from one court to another and back again and this cannot be allowed to continue. He has been trying hoping something gives. He has refused to let it go. It is now 38 years since the dispute was lodged in our court system. It has been heard and finally determined and found to be *res judicata*. The appellant has always crafted a way of introducing the dispute back to court. This has vexed the Respondents no doubt, coupled with the attendant costs and time expended. We are not inclined to sanction this state of affairs now or in the future. In the premises, this appeal fails, and we so order. The appellant shall pay the costs of this appeal and those in the courts below to the 2nd Respondent. We make no order as to costs with regard to the 1st Respondent who did not attend the hearing of this appeal though served with a hearing notice.

Dated and delivered at Nyeri this 20th day of September, 2017

G.B.M. KARIUKI SC

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR