



IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 60 OF 2015

BETWEEN

ISAACK BEN MULWAAPPELLANT

AND

JONATHAN MUTUNGA MWEKE.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Mombasa (Omollo, J.) dated 18th June, 2015

In

ELCC.N0.13 of 2015)

JUDGMENT OF THE COURT

The chequered history of this dispute dates back to 1985 when the respondent's father sued the appellant's mother before the panel of elders in Land Case No. **LND/KAL/92 of 1985** to determine the ownership of the disputed parcel of land and its boundary *vis á vis* that of the respondent. According to the respondent's father, the appellant's father migrated from his ancestral land in Mukana, Mariakani in the 1930s to Mtandikeni village in an adjudication area where the respondent's father allowed him to settle on the disputed land. The respondent's father's claim before the panel of elders was that, despite the status of the appellant's mother on the land, as a licensee she was in the process of selling it to third parties. The panel found in favour of the appellant's mother and gave an award to the effect that having been in occupation of a specific portion of the land where she had settled for a long period of time and planted permanent trees and having also confirmed to the panel that she had no intention of selling the land, the same belonged to her. The panel then visited the land and determine its boundary on 17th April, 1985 by drawing a sketch delineating the boundary between the appellant's mother's land and that of the respondent's father. That award was adopted and judgment accordingly entered by the Mombasa Resident Magistrate's Court in **Land Award No. 11 of 86** on 16th September, 1986. No appeal from this decision was proffered. Instead the respondent applied to the Magistrate's Court to review the judgment of 16th September, 1986. That application was dismissed. Again no appeal was lodged against the dismissal.

Twenty eight (28) years after that dismissal, the appellant, in his capacity as the administrator of his

mother's estate brought an action by a plaintiff on 29th January, 2015 claiming that the respondent was still encroaching by trespassing on the disputed land, threatening the appellant's quiet possession and proprietary interest. Consequently he applied that the respondent be restrained by an order of permanent injunction from evicting, or threatening to evict him from the disputed land, an order for proper adjudication and determination of the boundary and a declaration that the appellant was the legal owner of the land. That action was filed simultaneously with a motion to restrain temporarily the respondent from doing the acts enumerated in the plaintiff.

In the statement of defence and subsequently in a notice of preliminary objection the respondent adverted to the fact that the suit was *res judicata* **Land Case No. LND/KAL/92 of 1985**; which was adopted and judgment entered in the Resident Magistrate Land Award No.11 of 1986; that the issues raised in the suit were finally determined in the action of 1985; and that the parties in that action litigated on behalf of the parties herein.

Counsel representing the parties filed submissions citing authorities to buttress their respective positions. The learned Judge (**Omollo, J.**) after considering those submissions came to the conclusion that the panel having determined the questions of ownership and boundary, the suit instituted in the High Court as Civil Suit No. 13 of 2015 was *res judicata*. The learned Judge proceeded to strike out both the motion and the plaintiff with costs to the respondent.

The appellant has challenged that decision in this appeal relying on eight grounds. In our view, however, only one broad issue calls for our consideration, namely whether **H.C.C.C. No. 13 of 2015** was *res judicata* **Land Case No. LND/KAL/92 of 1985**.

Section 7 of the Civil Procedure Act is framed in a negative expression 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.

Explanation. -(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. -(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. -(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. -(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. -(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. -(6) 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, for the purposes of this section, be deemed to claim under the persons so litigating”

The doctrine of *res judicata* demands that there be an end to litigation, expressed in the maxim: *nemo debet bis vexari pro una et eadem causa* (no one should be vexed twice for the same cause), to signify finality in litigation and to prevent an abuse of the court process.

Res judicata is therefore a pure question of law regarding the jurisdiction of the court, and can be raised *in limine* to dispose of the matter before court. See **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696.**

Sir Charles Newbold P. explained that a point of preliminary objection is one which:-

“...raises a pure point of law which is argued on assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

The respondent in his statement of defence gave a clear indication that he would be raising a preliminary point regarding the competence of the suit. It is common ground that several years prior to the institution of the 2015 suit there was a suit involving the parents of the parties herein. That dispute involved the question of ownership and boundary of the land in question. A final decision was rendered with the appellant's mother being declared the lawful owner of the land and its boundary determined by an order issued by the Resident Magistrate's Court on 16th September, 1986 arising from the award by the panel.

For the doctrine of *res judicata* to be a complete defence in a civil action, the burden is on the party raising it to show, that there was a previous suit; that the matter in the subsequent suit was directly and substantially in issue in the previous suit; that the previous suit was between the parties in the present suit or between parties under whom they or any of them claim, litigating under the same title; that the previous suit was heard by a court of competent jurisdiction; and that the issue in the previous suit was heard and conclusively decided. The plea applies not only to points which the court was actually required to adjudicate, but also to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence ought to have brought forward at the time. See **Uhuru Highway Development Ltd v Central Bank of Kenya & others, Civil Appeal No. 36 of 1996.**

The respondent's father's claim before the panel, in his own words as recorded, reads thus:-

“...I accuse Mrs. Esther Kasyoka Balози for her intention of selling a portion (sic) of a piece of land that my father allowed her husband to put up a dwelling place and reside there. My second claim is that Mrs. Balози has already crossed our common boundary and is now claiming a portion of my shamba. I pray this Court to restrain her from selling a portion of the piece of land in dispute and that she stops extending her boundary beyond the mutual common boundary.

The late Mr. Balози was given a piece of land by my father when he came to my father and requested to be assisted for he had no land at Ruruma. We lived peacefully until his death (Mr. Balози). Problems cropped (sic) out when I learned that Mrs. Esther Balози was intending to sell a portion of the shamba.”

The appellant's mother on the other hand maintained that the disputed land belonged to her husband; that she had intended to sell a portion of it to enable her settle some debts incurred to pay school fees for her son; and that she later changed her mind and abandoned the idea. She also denied accusations that her activities on the land had gone beyond the limits of the boundaries of her portion into the respondent's parents' land. In conclusion she prayed that:-

“...the court do order the establishment of our common boundary with the plaintiff who is my neighbour in order to end future squabbles.”

Following her confirmation that she had abandoned her intention to sell a portion of the land, the entire

land in dispute was declared to be hers and the boundary with the respondent's father fixed.

The appellant instituted Mombasa H.C.C.C. No. 13 of 2015, claiming that after the panel of elders' award in land case No. LND/KAL/92 of 1985:-

“...9. The defendant started encroaching on the property again.

10. The defendant again started his activities last year and has now vowed to go on until he completely takes over the plaintiff's land.

11. ...the defendant has threatened to evict him from his ancestral land by claiming ownership to the same.”

Clearly from these averments the appellant was raising the same matters that had been the subject of the former litigation, namely the ownership of the property and trespass. While we entertain no doubt at all that the issue of ownership was conclusively determined we, however, think that the present claims of encroachment are different from those litigated before the panel of elders. The present acts of trespass could not have been foreseen in 1985 to have been made part of the claim by the appellant's mother. The present trespass, in our view was a fresh claim. We reiterate the words of this Court in **Nguruman Limited v Shompole Group Ranch & 3 others**, Civil Appeal No. 73 of 2004:-

“Whatever happened in the year 2000 appears from the plaint to have been a different trespass from the one in 1991. We have perused the work of Clerk & Lindsell on Torts, 16th Edition Paragraph 23-01. IV states:-

‘Every continuance of a trespass is a fresh trespass in respect of which a new cause of action arises from day to day as long as the trespass continues.’

It is in our mind not a frivolous issue as to whether the trespass pleaded to having taken place in the year 2000 was covered by the trespass in 1991.”

Each action of trespass constitutes a fresh and distinct cause of action. It is inconceivable that a claim based on an action for trespass committed in 2015 would be *res judicata* simply because the same parties or their parents litigated over the same matter in 1985. It is a well-settled principle that continuous injuries to land caused by the maintenance of tortious acts create separate causes of action barred only by the running of the statute of limitation against each successive acts. As explained by the learned authors **Winfield and Jolowicz** in **WINFIELD AND JOLOWICZ ON TORT**, 11th Edition, **Sweet and Maxwell**, London, 1979 at page 342:-

“Trespass, whether by way of personal entry or by placing things on the plaintiff's land may be continuing and give rise to actions *de die in diem* so long as it lasts. Nor does a transfer of the land by the injured party prevent the transferee from suing the defendant for continuing trespass.”

The learned Judge was therefore in error in holding that the present suit was *res judicata* that of 1985. Accordingly, this appeal succeeds and is allowed with costs. The orders of 18th June 2015 are set aside ELC NO. 13 of 2015 and the notice of motion dated 28th January, 2015 will be set down for hearing by a Judge other than Omollo, J.

Dated and delivered at Mombasa 26th day of February, 2016

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