IN THE COURT OF APPEAL

AT NYERI

CORAM: WAKI, NAMBUYE & KIAGE, JJA)

CIVIL APPEAL NO. 29 OF 2015

BETWEEN

NJUE NGAI.....APPELLANT

AND

EPHANTUS NJIRU NGAI.....1ST RESPONDENT

IRENE MARIGU NGAI.....2ND RESPONDENT

(An Appeal from the Ruling/Order of the High Court of Kenya Environment

and Land Court at Embu (Bwonwong'a, J.) dated 29th January, 2015

in

E. L. C. No. 829 of 2013)

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JUDGMENT OF THE COURT

Introduction

1. The appeal before us seeks a determination of the issue whether a suit filed by the appellant was *Res judicata* or an abuse of court process as declared by the **Environment and Land Court** (ELC**) (Bwonong'a J.)** sitting in Embu on 29th January 2015. The appellant **Njue Ngai** (Njue) and the two respondents **Ephantus Njiru** (Ephantus) and **Irene Marigu** (Irene) are siblings of the same mother, the late **Josephine Magwi Ngai** (the mother) who died in the year 2000. Njue was represented before us, as he was before the ELC, by learned counsel **Mr. Okwaro Muyodi,** while both Ephantus and Irene were represented by **Mr. Njeru Ithiga.** The historical context of the appeal is necessary and we shall relate it briefly.

Background.

2. For the last 15 years, Njue has unsuccessfully sought the stamp of judicial authority that he was the sole proprietor of all that parcel of land known as **KYENI/KIGUMO/609 (plot 609)** measuring approximately 2.77 Hectares or 6.85 Acres. He did not acquire it or purchase it himself. But it was first

registered in his name in 1961 during the land adjudication process in Embu when he was seven years old. The decision to do so was made by his father, Ngai Muragara, and the mother's Rwamba clan. They decided that the land be registered in the name of the first born son, Njue, as his father Ngai, who had a marital disagreement with the mother took another parcel of land, Kyeni/Mufu/1438 measuring about 3 Acres where he settled with his second wife and children. Njue continued to occupy and utilize plot 609 together with the mother who had other children, including Irene and Ephantus who were born on the land in 1967 and 1969, respectively. They had permanent crops like coffee and *macadamia* trees on the land.

3. The family lived in relative peace until 1997 when the mother sought to have the land subdivided and different titles issued to her children. But Njue protested and reminded her that he was the registered proprietor of the land. A certificate of title had been issued for it in 1970 when he was in Standard 7. He finished Form 4 in 1975 and trained as a Pastor, eventually becoming Reverend James Njue. In July 2000, he filed **Case No. 26/2000** before the Embu Land Disputes Tribunal **(LDT)** seeking affirmation of ownership and eviction of his mother, and the two siblings. He also joined his father, Ngai, in the suit. Despite the assertion by the rest of the family that Njue was registered as proprietor of the land in trust for them and that they had occupied and worked on the land for a long time without let or hindrance, the tribunal decided in favour of Njue and ordered the mother and the two siblings to move out and join the second family of Ngai in the 3-Acre parcel of land.

4. The four family members appealed to the Provincial Land Disputes Appeals Committee (Appeals Committee) in **Appeal No. 125/2000**. Upon rehearing the matter fully, the Appeals Committee reversed the decision of the Land Disputes Tribunal and ordered that plot 609 be divided into two portions: 2 Acres to be registered in the name of the mother to hold in trust for herself, Irene and Ephantus, while Njue would retain 4.85 Acres. That was in July 2001.

5. Njue was not satisfied with that decision and he sought to challenge it before the High Court. He filed **HCCA No. 47 of 2001** on 9th August 2001. However, four and a half years later, the appeal was still lying in court unprosecuted despite warnings from the court. So, on 11th February 2005, the appeal was dismissed. Another three and a half years went by without action, when on 17th October 2008, Njue filed an application to have the appeal reinstated for hearing. He withdrew that application one year later and filed another one on 1st July 2009. After hearing submissions and considering the application on merits, the High Court **(Muchelule J.)** dismissed it on 31st December 2012.

6. Njue was not done. He came before this Court in **CA No. 69/2012** and the Court, differently constituted, dismissed the appeal as it lacked supportive evidence and Njue had concealed material facts from both the High Court and the Court of Appeal. That was on 6th November 2013.

7. One would have thought the matter had come to a final rest after 13 years of litigation. But not Njue. He returned to the Environment and Land Court in Kerugoya and filed **ELC No. 829/2013** on 17th December 2013. He sought to challenge the decision of the Appeals Committee made in July 2001. For obvious reasons, he did not file a Judicial Review application to have the orders of the Appeals Committee quashed. The application would have been time-barred. Instead, he filed an ordinary suit on 13th December 2013, seeking a declaration that the decision on the Appeals Committee was illegal and *ultra vires* the jurisdiction of the committee and therefore orders should be issued to quash and/or set it aside, evict the two siblings, and permanently restrain them from entering therein. By that time the mother had died.

8. Irene and Ephantus were in no doubt that Njue was attempting to file a delayed appeal through the back door and that the suit was an abuse of court process as it was r*es judicata*. In addition to filing their defence, they raised the issue as a Preliminary Objection (PO) and sought the striking out of the suit. Upon hearing submissions on both sides and examining the undisputed history behind the case, Bwonong'a J. found that the Appeals Committee was authorized by the Statute then existing to entertain appeals from the Land Disputes Tribunal and had the competence to decide one way or the other with finality after hearing such appeals, leaving only issues of law, if any, to go to the High Court. The

decision became final when the challenge filed in the High Court dissipated, and the fresh suit was therefore *res judicata*, the court held, and struck out the suit. Njue is now before us to challenge that finding.

The appeal and submissions of counsel.

9. The 8 grounds in the memorandum of appeal may be summarized, thus:-

The trial court erred in:

- ***failing to find that the doctrine of res judicata did not apply.***
- ***finding that res judicata applied despite accepting that a declaratory suit was an alternative to Judicial review.***
- ***finding that the issues in the suit had been properly/competently determined by the Appeals Committee.***
- ***failing to find that the Appeals Committee was not competent to entertain, hear and determine ownership/ title to registered land , or order sub division of it.***
- ***failing to find that the Appeals Committee acted in excess of its jurisdiction.***
- ***failing to find and hold that the matters raised in the declaratory suit were not directly and substantially the same as the matters before the Appeals Committee.***
- ***failing to find that the jurisdiction of the Appeals Committee was restricted by the Land Disputes Tribunal Act, No 18/1990 (now repealed), and that any decision made outside the Act was ultra vires.***
- ***failing to find that the subject matter of the declaratory suit was the legality and propriety of the decision of the Appeals Committee and no other suit had been filed before raising the same issue.***

10. Those grounds were argued by Mr. Muyodi globally under one issue; whether the suit was *res judicata*. In his view, the issue of the decision of Appeals Committee being *ultra vires* never arose before. The original matter that Njue took before the Land Disputes Tribunal was a claim and not a suit, and it had the jurisdiction to determine as it did in his favour. However, he contended, the Appeals Committee went overboard and that is why Njue went on appeal to the High Court which never heard the appeal on merits. Citing the cases of **Uhuru Highway Development Limited vs. Central Bank of Kenya & 2 others [1996] eKLR** and **Ukay Estate Ltd & Another vs. Shah Hirji Manek Ltd & 2 others [2006] eKLR**, he submitted that dismissal for want of prosecution is not a decision on merits as envisaged under **explanation 2** of **Section 7** of the **Civil Procedure Act**. The suit was therefore not *res judicata*.

11. In response, Mr. Ithiga submitted that the doctrine of *res judicata* was a reinforcement of the public policy that there must be an end to litigation and that a party should not be vexed twice over in the same litigation. The harassment of the respondents had lasted 15 years through six different courts and it had to come to an end. He asserted that the case has been heard throughout by competent courts whose decisions cannot now be challenged, and the purported declaratory suit was a back door attempt to appeal against those decisions. The appellant can only blame his indolence and not any of the courts involved. The issue of *res judicata* was therefore correctly appreciated and determined by the trial court.

Analysis and determination.

12. We have considered the appeal and the submissions of counsel. As earlier stated, the issue argued by

counsel for the appellant, which we have to decide on, is whether the appellant's suit was *res judicata*, as held by the High Court. It was raised as a Preliminary Objection and therefore had to be a pure point of law which was capable of disposing of the suit. All the relevant facts as summarized above were also not in dispute and the matter did not call for the exercise of the trial court's discretion. That was in line with the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696.**

13. What is *res judicata* and when does it apply? The Latin of it is simply *"a thing adjudicated"*. But it has overtime received extensive judicial interpretation in various jurisdictions of the globe which we shall not be tempted to explore here. Suffice it to adopt the definition in **Black's Law Dictionary, Ninth edition,** as:

> ***"(i)An issue that has been definitively settled by judicial decision;***
>
> ***(ii)An affirmative defence barring the same parties from litigating a second lawsuit 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.***

14. In the case of **Ukay Estate Ltd & another vs Shah Hirji Manek Ltd & 2 others [2006] eKLR**, (supra), cited by the appellant, Waki JA stated as follows:

> ***"The doctrine is not merely a technical one applicable only on records. It has a solid base from considerations of high public policy in order to achieve the twin goals of finality to litigation and to prevent harassment of individuals twice over with the same account of litigation. Put another way, there must be an end to litigation and no man shall be vexed twice over the same cause."***

15. The principle is captured in **Section 7** of the **Civil Procedure Act** as follows:

> ***"7. 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 court."***

We may add ***Explanation 4*** which states:

> ***"Any matter which might and ought to have been made ground of defence or attack in such a former suit shall be deemed to have been a matter directly and substantially in issue in such suit."***

16. An issue may then arise from that section as to whether interlocutory proceedings, appeals or civil proceedings other than suits commenced by plaint are covered under the section or under the general principle of *res judicata*. The **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR**, (supra) which is relied on by the appellant, extensively discussed the issue and particularly whether the principle of *res judicata* applied to an application heard and determined in the same suit. In other words, whether a matter of interlocutory nature decided in one suit can be subject of another similar application in the same suit. The Court held that the principle was applicable and that **Section 7** was but an aspect of the general principle, stating thus:

> ***"..there must be an end to applications of similar nature; that is to say further, wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that section 89 of our Civil Procedure Act caters for.***
>
> ***The word "suit" is defined in section 2 of our Civil Procedure Act as:***

"Means all civil proceedings commenced in a any manner prescribed."

Also the word "prescribed" has been defined to mean "prescribed by rules" and "rules" are defined to mean "rules and forms made by the Rules Committee to regulate the procedure of the courts". What stands out as most important here is that section 89 of our Civil Procedure Act makes it mandatory to follow the procedure provided in the Act makes it mandatory to follow the procedure provided in the Act to all proceedings in any Court of Civil jurisdiction. That can only mean that interlocutory proceedings come within the purview of the word "suit" for the purpose of the issue of res judicata by virtue of section 89 of our Civil Procedure Act"…….. "We have no hesitation whatsoever in saying that the general principles of res judicata cannot be limited by section 7 of the Civil Procedure Act and that the section (Section 7) is not exhaustive." (Emphasis added)

17. As regards appeals, we take it from this Court's decision in **Morjaria v Abdalla [1984] eKLR:**

"We therefore have to consider whether the words "pending suit" are wide enough to cover a pending appeal. For this purpose we have to decide whether this appeal is a suit, because appeals are provided for by statute. Under section 2 of the Civil Procedure Act, "suit" means all civil proceedings commenced in any manner prescribed. According to Jowitt's Dictionary of English Law, Second Edition, Volume 2 page 1718, the "suit" means a following, any legal proceeding of a civil kind brought by one person against another. The Shorter Oxford English Dictionary (Vol II) offers several definitions of 'suit', one of which is:

"pursuit, prosecution, legal process."

The appeal is a civil proceeding between the parties which originated before the High Court."……"In the case of Bhagat Singh v Chauhan and Others (1956), 23 EACA 178, there is this passage (per Briggs JA as he then was) which is directly on the point, and with which we completely agree, at page 186:-

"an appeal in Kenya from a subordinate court may itself be a "suit" in that it is a proceeding "commenced" in manner prescribed etc. This is in clear opposition to the Indian view but I think it may well be justified first by the special definition of "suit" as opposed to the governing decision in India that a suit is ordinarily a proceeding started by a plaint. Secondly I think that according to ordinary conceptions an appeal is something different from the cause from which the appeal sprang.

I think the Kenya Legislature may well have intended to provide that an appeal shall be treated as a new proceeding and therefore "commenced" when the appeal is instituted, and that, if the appeal is brought "in manner prescribed" by the Ordinance and Rule, it is itself a "suit" in which a judgment may be pronounced.."…… Reverting to the instant case there can, we think, be no doubt that an appeal is a civil proceedings, commenced in a manner prescribed, and therefore falls within the definition of a suit.". (Emphasis added)

18. Another issue may arise as to whether a dismissal of a suit for non attendance of the plaintiff or for want of prosecution, amounts to a judgment in that suit. The predecessor of this Court answered that issue in the affirmative when considering the dismissal of a suit for failure by the plaintiff to attend court in the case of **Peter Ngome vs Plantex Company Limited [1983] eKLR.** stating:

"Rule 4(1) does not say "judgment shall be entered for the defendant or against the plaintiff." It uses the word "dismissed." The Civil Procedure Act does not define the word "judgment". According to Jowitt's Dictionary of English Law 2nd ed p 1025:

"Judgment is a judicial determination; the decision of a court; the decision or sentence of a court on the main question in a proceeding or/one of the questions, if there are several."

Mulla's Indian Civil Procedure Code, 13th Ed Vol 1 p 798 says: "Judgment" means the statement given by the judge on the grounds of a decree or order;" "Judgment - in England, the word judgment is generally used in the same sense as decree in this code."

In my view, a judgment is a judicial determination or decision of a court on the main question(s) in a proceeding and includes a dismissal of the proceedings or a suit under Rule 4(1) of Order IXB or under any other provision of law. A dismissal of a suit, under Rule 4(1), is a judgment for the defendant against the plaintiff. An application under Rule 3 of Order IXB includes application to set aside a dismissal. This must be so because, when neither party attends court on the day fixed for hearing, after the suit has been called on for hearing outside the court, the court may dismiss the suit, and, in that event, either party may apply under Rule 8 to have the dismissal set aside or the plaintiff may bring a fresh suit subject to any law of limitation of actions: See Rule 7(1) of Order IXB. This, I think, clearly shows that Rule 7(2) was intended to bar a plaintiff whose suit has been dismissed under Rule 4(1), only from bringing a fresh suit. That provision does not bar such a plaintiff from applying for the dismissal to be set aside under Rule 8." [Emphasis added]

19. To summarize, as stated in the **Uhuru Highway case** (supra), 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.

20. The trial court found, and it was borne by the record, that in respect of those requirements, Njue filed his claim before the Land Disputes Tribunal to assert his right of ownership or Title to plot 609, and to evict his mother and two siblings therefrom. Whether it was a 'claim' or a 'suit' is not material since it was a 'civil proceeding' commenced in a prescribed manner. The law existing at the time provided for an avenue of appeal for any party dissatisfied with the decision of the LDT to the Appeals Committee and the respondents here filed that appeal and succeeded in overturning the decision of the LDT. We are not seized of the jurisdiction to re-examine the merits of that decision and it would be futile to do so at this stage. But the High Court had the jurisdiction to entertain, hear and determine any issues of law that any party may have wished to raise on the decision of the Appeals Committee. Njue therefore filed an appeal raising the issue of the competence of the Appeals Committee and the legality of its decision. He was litigating under the same title and the respondents were the same save for the death of the mother midstream. But the appeal was dismissed for want of prosecution and all attempts to reverse the decision came to nought when this Court rejected further appeal against the dismissal.

21. Now, we have seen that a dismissal for want of prosecution was as good as a final judgment in the appeal unless a successful application for setting aside was filed. There can be no doubt therefore that Njue's appeal to the High Court was decided by a competent court. The dismissal also meant that the decision of the Appeals Committee stood unchallenged and final, warts and all. The fresh suit filed by Njue was christened a ***'Declaratory Suit'*** which he contended was an alternative to ***'Judicial Review'***. By whatever name called, it was a new suit and, as earlier stated, he was time barred in filing a Judicial review application to quash the decision of the Appeals Committee made 12 years earlier. The semantic change was merely a clever turn (but that legal ingenuity was within a cul-de-sac). The declaratory suit nevertheless sought the following orders:

a) A Declaration that the decision/award of the Eastern Provincial Land Disputes Tribunal (Appeals) in Case Number 125 of 2000 to wit that the Plaintiff's Land Parcel Number Kyeni/Kigumo/609 be subdivided into two portions, one of 4.85 Acres to be registered in the Plaintiff's name and another one of 2.0 Acres to be registered in the name of Josephine Magwi

Ngai to hold in trust for herself and for the 1st and 2nd Defendants Ephantus Njiru Ngai and Irene Marigu Ngai respectively, be quashed and/or set aside as the same is illegal and ultra vires the jurisdiction of the Provincial Land Disputes Tribunal (Appeals) as it was then constituted.

b) That the 1st and 2nd defendants jointly and severally, their families, servants and/or agents do remove themselves and their properties from Land Parcel Number Kyeni/Kigumo/609 within 30 days from the date of judgment and that in default the Defendants jointly and severally together with their family members and properties be evicted from parcel Number Kyeni/Kigumo/609 within 60 days from the date of judgment.

c) That the Defendants jointly and severally be permanently restrained from re-entering upon, using or occupying Land Parcel Number Kyeni/Kigumo/609 or in any other way interfering with the Plaintiff's use, occupation and exercise of the Plaintiff's proprietor y rights over Land Parcel Number Kyeni/Kigumo/609.

d) That the Plaintiff be awarded costs of this suit.

22. It is clear to us, as it was to the trial court, that the declaratory suit raised the same or substantially the same issues decided before the Appeals Committee and confirmed by the High Court in dismissing the appeal. The filing of it was in breach of **Section 7** of the **Civil procedure Act** and a matter that satisfies the tests for a defence of *res judicata* as stated above. We find no fault with the reasoning of the trial court and hereby affirm its decision. There must be an end to litigation.

23. For those reasons, we find and hold that this appeal has no merit and is dismissed with costs to the respondents.

Dated and delivered at Nyeri this 3rd day of February, 2016.

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