



**IN THE COURT OF APPEAL**

**AT KISUMU**

**CORAM: MARAGA AZANGALALA & KANTAI JJ.**

**CIVIL APPEAL NO. 197 OF 2012**

**BETWEEN**

**ANDREW MARIGWA .....APPELLANT**

**AND**

**JOSEPHAT ONDIEKI KEBATI .....RESPONDENT**

(An Appeal from the Ruling & Order of the High Court of Kenya at Kisii by (Sitati, J.) dated

17<sup>th</sup> May, 2012

in

H.C.C NO. 82 OF 2011)

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**JUDGMENT OF THE COURT**

This is an appeal from the ruling of the High Court (Ruth Sitati, J.) delivered at Kisii on 17th May, 2012.

The appellant herein, **Andrew Marigwa**, filed suit by way of High Court of Kenya at Kisii claiming, among other things, declarations to the effect that the respondent, **Josephat Ondieki Kebati**, had encroached and " **incised**" portion of land comprising approximately 0.004 of a hectare of title number West Mugirango/Bonyamatuta/1724 (hereinafter "**the suit land**"); that the respondent his agents, servants and or other persons howsoever are wrongfully in occupation of the same land and that an order be issued evicting them therefrom and thereafter an order of permanent injunction be issued restraining them from the suit land.

Appurtenant to the plaint, the appellant lodged a Notice of Motion under the provisions of **Order 40 Rules 1,2, and 3** of the Civil Procedure Rules, **Sections 1A, & 1B, 3A and 63(e)** of the Civil Procedure Act and all other enabling provisions of the law seeking the following main order s:

**"(b) That pending the hearing and final disposal of this Application this Honourable Court be pleased to issue an order of a mandatory injunction compelling the Defendant/Respondent by himself of [or] his agents, servants and/or assignees or any other person or persons to vacate, quit and move out of the suit portion of land measuring**

approximately 0.004 forming part of LR. No . *WEST MUGIRANGO/BONYAMATUTA/1724* forming part of the estate of the deceased *PAULINA KERUBO MARIGWA* together with building materials he has deposited thereon.

(c)That pending the hearing and final disposal of this SUIT the Defendant/Respondent by himself, his agents, servants , and/or assignees or any other persons howsoever be restrained by an order of injunction of this court from entering on to and/or trespassing onto, occupying and or [in] any or manner whatsoever interfering with the, plaintiff/applicant's occupation, peaceful and quiet enjoyment of the suit portion of land forming part of Land Parcel Title No.*WEST MUGIRANGO/BONYAMATUTA/1724* and being the estate of the deceased *PAULINA KERUBO MARIGWA*."

The respondent herein was served with the said plaint and application and duly entered appearance, delivered a defence and filed a replying affidavit to which the appellant responded by filing a supplementary affidavit.

Before the Notice of Motion was heard, the respondent, through his advocates, *M/S Oguttu-Mboya & Co.* filed a Notice of Preliminary Objection to the entire suit on various grounds, among them, that the court had no jurisdiction to entertain the dispute by virtue of the provisions of the Land Disputes Tribunals Act No. 18 of 1990; that the suit was barred by dint of the provisions of **Section 21(4)** of the Registered Land Act (now repealed) and **section 7** of the Civil Procedure Act; that the suit was statute barred under **section 4** of the Limitation of Actions Act, Chapter 22 Laws of Kenya and as the suit disclosed no reasonable cause of action, it was an abuse of the process of the court.

When the application came up for hearing before Ruth Sitati J, the respondent's counsel, Mr. Oguttu-Mboya, sought to argue the preliminary objection. The learned Judge then directed that the same be canvassed by way of written submissions which were then duly filed.

The learned Judge considered the rival submissions and in the end came to the conclusion that the preliminary objection was properly raised and eventually upheld the same. In concluding her ruling the learned Judge said:-

"14 .....

While I appreciate the plaintiff's situation of having been failed by Nyamira District Land Registrar, there is no doubt in my mind that the boundary dispute between the parties was heard and determined not only by the Nyamira District Land Tribunal but the award thereof was adopted by the Nyamira SRMCC Misc. Application No. 8 of 2005. Clearly the dispute having been determined by a court of competent jurisdiction is now res judicata and the plaintiff/applicant cannot purport to resurrect it by whatever name.

15. Secondly under section 21 (4) of the RLA which is the regime of land law under which the suit land is registered, this court has no jurisdiction to entertain this suit before compliance with section 21 (1) of the RLA. The plaintiff/applicant has argued that though the District Land Registrar did not visit the site as desired a private surveyor did so. Unfortunately, section 21 (4) of the RLA does not talk of a private surveyor and I think for good reason. Land being what it is a very rare commodity, it is necessary to put tabs on who can do what so as to protect gullible land owners against the schemes of those whose intention is to deprive others of their land. That law has not been amended

or changed and the same thus applies to this case.

16. In the premises, I have come to the conclusion that the defendant's preliminary objection has merit. I am of course alive to the holding of Madan JA in the DT Dobie (case above) about the need for courts to sustain rather than terminate suits. The instant case has many forces acting against its existence. It is not a matter of breathing life a new into the case by way of amendment. This case cannot be amended. It ought not to have been filed in the first place because the issues in controversy have already been determined by a court of competent jurisdiction

.....

17. Accordingly the preliminary objection is sustained....."

It is the foregoing which provoked this appeal in which the appellant, through his advocates *M/s Momanyi Aunga & Co*, set out some eleven grounds of appeal. Those grounds in summary complain that the learned Judge erred in holding that the appellant's suit was res judicata; that she erred in determining that she lacked jurisdiction to entertain the dispute; that she erred in finding that the failure to fix the boundary by the District Land Registrar and District Surveyor was fatal to the appellant's claim and that the learned Judge misapprehended the decisions in the case of *DT. Dobie & Co (Kenya) Ltd -Vs- Muchina [1982] KLR 1* and the case of *Mukisa Biscuits Manufacturing Co -Vs- West End Distributors [1969] EA. 696*.

The appeal came up for hearing on 24th February, 2015 while the Court was on circuit in Kisii when Mr. Momanyi appeared for the appellants while Mr. Ochwangi appeared for the respondent

In his submissions, Mr. Momanyi argued that the claim before the high Court was for land as the pleadings disclosed and documents exhibited demonstrated. In learned counsel's view, the nature of the claim, the pleadings and exhibits were not adequately appreciated by the learned Judge especially as the respondent, in his papers, acknowledged the existence of a dispute between him and the appellant. Mr. Momanyi further submitted that the dispute went beyond a boundary dispute and was outside the purview of **section 21 (4)** of the Registered Land Act and outside the scope of a preliminary objection. In learned counsel's view, the principles in the D.T. Dobie case (supra) and the Mukisa Biscuits case were improperly applied.

Mr. Ochwangi, in opposing the appeal, submitted that the appellant's claim before the High Court was clearly *res-judicata* as the dispute was over a boundary which had been determined by the Land Disputes Tribunal whose decision had been adopted by the subordinate court and from which decision, no appeal, had been preferred. In learned counsel's view, the appellant's suit was a clear abuse of the process of the court as he had no reasonable cause of action. For those reasons, Mr. Ochwangi was of the view that the appeal lacked merit and he therefore asked us to dismiss it.

We have considered the rival submissions in this appeal as argued by Mr. Momanyi for the appellant and Mr. Ochwangi for the respondent. We have also anxiously considered the record which contains the material which was before High Court. The ruling which is being challenged in this appeal has its origin in a suit and application in the High Court in which the appellant herein sought certain orders which we have set out at the commencement of this judgment. From the record and the submissions of counsel appearing for the parties, it is not in dispute that there was Nyamira Division Land Disputes Tribunal case No. 27/2004 involving the parties herein which dispute resulted in the ruling follows:-

**"RULING**

1. There is **prima facie** evidence that the Title Deed was obtained by plaintiff lawfully and therefore he is the absolute sole proprietor of parcel No. W. MUGIRANGO/BONYAMATUTA/1726 ('WHOLY').

2. The plaintiff should not be disturbed by the defendant. The land measuring 25ft by 100ft was legally transferred to the plaintiff and it must remain intact in position the plaintiff the true owner (sic).

3. That the "**RESTRICTIONS**" placed on the parcel No. W. Mugirango/Bonyamatuta/1726, must be removed unconditionally."

It is this ruling which was adopted as the judgment of the court in Nyamira SRMC Misc. Application No.8 of 2005.

In the plaint and application which were struck out by the High Court and which order gave rise to this appeal, the appellant claimed, *inter alia*, that "**in or about the year 2004 the respondent wrongfully and unlawfully entered and took possession of a portion of land measuring approximately 0.004 HA part of land parcel NO WEST MUGIRANGO/BONYAMATUTA/1724 and started claiming ownership of the same and that the plaintiff had trespassed onto his land NO. LR WEST MUGIRANGO/BONYAMATUTA/1726 and erected thereon a fence**" The appellant acknowledged, in the suit before the High Court, that "**The Tribunal case was heard by the Tribunal and [which] ruled that Land parcel Title (sic) Number WEST MUGIRANGO/BONYAMATUTA/1726 belongs to the Defendant**". He however, averred that "**the Tribunal did not solve the problem of a boundary dispute between Land Parcel Nos WEST MUGIRANGO/BONYAMATUTA/1724 and 1726.**" The appellant then prayed for, among other things, "**a declaration that the Defendant has encroached and incised (sic) a portion of land measuring approximately 0.004 HA forming part of LR No. WEST MUGIRANGO/BONYAMATUTA/1724 the estate of the deceased.**" The appellant also sought "**a declaration that the Defendant by himself or his agents, servants or assignees or any other person (s) howsoever is wrongfully in occupation of the suit portion of Land**" and should not remain thereon but be evicted therefrom.

We have quoted at length portions of the appellant's pleadings in order to appreciate whether indeed the appellant's claim could be defeated by the plea of *res-judicata*. For completeness of the record we now look at the statement of defence delivered by the respondent. He averred *inter alia*, that "**prior to the issuance of the Title Deed in respect of LR WEST MUGIRANGO/BONYAMATUTA/1726, the boundary positions between LR NO'S WEST MUGIRANGO/BONYAMATUTA/1724, & 1726, were properly demarcated and shown on the Mutation Form which was registered on the 5<sup>th</sup> day of November 1992.**"

He then further averred that "**However on or about November, 2004, the Plaintiff herein, encroached upon a portion of LR NO. WEST MUGIRANGO/BONYAMATUTA/1726 and laid claim thereto contending that the disputed portion, fell on LR, NO. WEST MUGIRANGO/BONYAMATUTA/1724.**" And also that "**Nevertheless, the plaintiff herein has continued to lay claim to a portion of LR NO WEST MUGIRANGO/BONYAMATUTA/1726, which claim is misplaced. In particular the plaintiff continues to traverse the main road and thereby encroach upon LR NO WEST MUGIRANGO/BONYAMATUTA/1726 whereas LR NO WEST MUGIRANGO/BONYAMATUTA/1724 1) does not cross the main road**"

**Res judicata** prerequisites are found in **section 7** of the Civil Procedure Act which reads:-

"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 such court"**

Having considered the record of the Nyamira Division Tribunal case No. 27 of 2004 and the subsequent adoption of its decision in Nyamira SRMC Misc. Application No. 8 of 2005, we doubt whether the appellant's claim before the High Court at Kisii could be defeated by *res judicata plea*. Firstly the Land Disputes Tribunal proceedings related to an alleged boundary dispute which involved land parcel No West Mugirango/Bonyamatuta/1726. Throughout those proceedings there was no mention of parcel numbers WEST MUGIRANGO/BONYAMATUTA/1724, and 1725. Further the appellant's claim before the High Court in Kisii was over a specific portion of land comprising approximately 0.004 of a hectare which was alleged to be part of land parcel number West Mugirango/Bonyamatuta/1724. The appellant was therefore making a claim over land which claim could not lawfully be resolved under the repealed Land Disputes Tribunal Act No. 18 of 1990.

We have also perused the decision of the tribunal which decision we set out in full earlier on in this judgment. All that the tribunal did was to declare the obvious that parcel number West Mugirango/Bonyamatuta/1726 lawfully belonged to the respondent who should not be disturbed by the appellant and further that the restrictions thereon be removed. It cannot be said with any certainty that that decision determined the appellant's claim as laid in his plaint before the High Court.

Our consideration of the issue of *res judicata* has also answered the issue whether the preliminary objection was properly raised before the High Court. The Law as regards what constitutes a proper preliminary objection was restated in the case of *Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors Ltd* (supra) where it was stated, at page 700, as follows:-

*"A preliminary objection consists of a pure point of law which has been pleaded or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."*

In the same case the Court stated, at paragraph 701B, as follows:-

*"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the 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."*

Plainly therefore from the above rendition of what a preliminary objection is and when it may be raised, two prerequisites were not demonstrated by the respondent. Firstly, he did not raise the preliminary objection on the assumption that the entire facts pleaded by the other side were correct, indeed the facts were vigorously contested. Secondly, as can be deduced from our above analysis, a determination of whether the appellant's claim was *res judicata* involved the ascertaining of facts. The two factors, in our judgment, removed what the respondent raised before the High Court from the purview of a proper preliminary objection.

On the issue of want of jurisdiction by dint of the provisions of **section 21 (4)** of the Registered Land Act Cap 300 Laws of Kenya (now repealed), we think the learned Judge, with all due respect to her, interpreted that provision rather narrowly. The pleadings we have ourselves considered went beyond a mere dispute over a boundary and, on the material before the learned Judge, a determination as to whether **section 21 (4)** of the Registered Land Act aforesaid could be invoked, is doubtful.

In all those premises, we have come to the conclusion that the learned Judge, with all due respect to her, did not appear to have adequately appreciated the decisions of this Court in the cases of *Mukisa Biscuits*

(supra) and D.T.Dobie (supra). We are of the firm view that the respondent was not entitled to raise a preliminary objection to the appellant's application and suit in the High Court. The appellant was improperly driven away from the seat of justice before his claim was properly adjudicated upon.

To conclude, this appeal is allowed and the ruling of the High Court is hereby set aside. We substitute therefor an order dismissing the respondent's preliminary objection. The appellant's suit together with the Notice of Motion both dated 29<sup>th</sup> April, 2011 are hereby reinstated and should be heard in the normal manner by a judge other than Ruth Sitati, J.

We order that the costs of the appeal and of the Preliminary objection in the High Court be and are awarded to the appellant. Judgment accordingly.

**DATED AND DELIVERED AT KISUMU THIS 23<sup>RD</sup> DAY OF APRIL, 2015**

**D.K.MARAGA**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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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**