



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.)**

**CIVIL APPEAL NO. 44 OF 2014**

**BETWEEN**

**THERESA COSTABIR..... APPELLANT**

**AND**

**ALKA ROSHANLAL HARBANSLAL SHARMA .....1<sup>ST</sup> RESPONDENT**

**MAMTA ROSHANLAL SHARMA..... 2<sup>ND</sup>RESPONDENT**

***(Being an appeal from the judgment of the Environment and Suit premises Court of Kenya at Malindi (Angote, J.) dated the 27<sup>th</sup> February, 2015 in E.L.C.C. No. 24 of 2014)***

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**JUDGMENT OF THE COURT**

As with most legal proceedings, the parties' versions of the truth in this case are as varied as the orders they have sought in various court proceedings amongst themselves. But what is not contested is that the respondents are the legal representatives of the estate of the late **Hansapal Kultar** (*the deceased*). According to the appellant, on 15<sup>th</sup> March 1988 and 2<sup>nd</sup> August, 1988, the deceased, advanced two friendly loans totaling Kshs.800,000/- to the appellant, for the purchase of land parcels described as **Plot Nos CR 18142- Subdivision No 848/III/MN, CR 18143-Subdivision No. 849/II/MN, CR 18144- Subdivision No. 850/III/MN, CR 18145- Subdivision No. 851/III/MN and CR 181146-Subdivision No. 852/III/MN** together with the remainder of the mother title, **CR No. 18147** all hereinafter referred to as "*the suit premises*".

The suit premises were duly purchased and registered in the appellant's name. As part of the terms of the loan agreement it was understood that upon receipt of the title documents, the appellant would deposit them with the deceased, who would hold them as security in his capacity as a chargee, pending the repayment of the loan. The appellant duly complied with this requirement. Unfortunately, the deceased passed on prior to the repayment of the loan. Upon learning of the demise, the appellant contacted 1<sup>st</sup>respondent "*the deceased's widow*", in a bid to find out who the administrators to his estate were, to facilitate the repayment of the loan. These efforts proved unsuccessful, due to what the appellant terms as an uncooperative and evasive attitude by the 1<sup>st</sup> respondent towards her.

Growing suspicious, the appellant made enquiries with the Land Registrar Mombasa, seeking to ascertain the status of the suit premises. The Registrar's response was that all as well as the suit premises were

still registered in her name. Sometimes later, the appellant, who was in occupation noticed the presence of some strangers who appeared to be inspecting the suit premises. They purported to be prospective buyers. This alarmed her and necessitated another round of enquiries at the land registry. It was then that it dawned on her that the bulk of the suit premises had been transferred to a company by the name of Timesharing Company Limited, “*the company*” by the 1<sup>st</sup> respondent; save for one parcel, which had been further transferred to one **Newton Omondi Kulla** (*third party*) without her knowledge or consent.

Convinced that there was fraud and armed with this information, the appellant commenced a civil suit being **Mombasa H.C.C.C 222 OF 2012** (later transferred to Malindi and registered as **E.L.C 39 OF 2013**), against Jeremiah M. Maroro, the company, the third party and the Land Registrar- Mombasa. Jeremiah M. Maroro, was sued as the advocate said to have drawn up the impugned transfers. This suit shall henceforth be referred to as “*the primary suit*”.

In the primary suit the appellant sought orders of permanent injunction forbidding dealing in any manner with the suit premises by the defendants aforesaid, surrender of the original title deeds and deed plans, cancellation of all entries in the register pertaining to the fraudulent transfers and the issuance of provisional certificates of title to the appellant, as well as general damages.

On the other hand, the respondents’ narrative is that in 2012, while the 1<sup>st</sup> respondent was in the course of administering the deceased’s estate, she came upon some transfer documents dated 19<sup>th</sup> August, 1993, pertaining to the suit premises. According to her, the said transfers had been executed by the appellant in favour of the company. That naturally led her to conclude that prior to the deceased’s demise, there had been a sale agreement in the offing between the appellant and the company. With this belief, the 1<sup>st</sup> respondent proceeded to perfect and finalize the transfer by registering the executed transfers and thereafter having title deeds issued in favour of the company. In her view, the suit premises were sold to the deceased through the company and given that the company belonged to the respondents and the deceased, and in view of the executed transfers, she had no doubt at all in her mind that the deceased had duly performed his obligations as per the sale agreement and that it was only the registration and issuance of titles that was outstanding. It was on this premise that the company thereafter transferred part of the suit premises to the third party. The allegations of fraud made by the respondents were thus alien to her. In the same spirit, she indicated that she knew nothing of the purported loan arrangement because according to her, what had taken place was a sale of the suit premises and not a charge of the suit premises as alleged by the appellant.

The suit arising from the contested facts above was heard and by a judgment delivered on 25<sup>th</sup> October, 2013. **Angote J.**, ruled in favour of the appellant, holding that the transfer of ownership of the suit premises to the company was irregular, null and void. That as a result, the company could not pass good title to the third party, meaning therefore that the title issued to the third party was equally null and void. Further, that the transfer to the company was not only fraudulent, but that the documents in respect thereof were forgeries, drawn by an unqualified person, Jeremiah M. Maroro, masquerading as an advocate. The trial Judge went on to hold that indeed a loan agreement existed between the deceased and the appellant in the form of an informal charge and with this in mind, the court granted all the orders sought in the claim, save for the prayer for general damages, which the Judge declined to award.

Undeterred even in the face of this decision, the respondents nonetheless saw a silver lining in the same judgment and decided on a change of tact. On the strength of the holding by the Judge that a loan agreement existed between the parties as opposed to a sale agreement, the respondents abandoned their earlier denial of the existence of a private charge and instead sought to enforce their rights as chargees. Thus they filed **Malindi ELC Misc. Appl No. 24 of 2014** “*the O.S*” against the appellant. This second suit was commenced through an undated and unsigned Originating Summons (O.S) filed on 5<sup>th</sup> August, 2014, seeking *inter alia*; vesting orders in favour of the respondents in respect of the suit premises in line with **Section 79** of the Land Act. These proceedings were vehemently opposed by the appellant, who by a replying affidavit sworn on 25<sup>th</sup> August 2014, deposed that the proceedings were *res judicata*, an abuse of the court process and time barred. The appellant particularly took issue with the respondents’ apparent and sudden realization of their rights under the Land Act, saying that these were allegations that ought to

have been made or raised in the primary suit. That having been determined in the primary suit, the issue of proprietorship was *res judicata* and could therefore no longer be re-litigated before the same court.

Upon hearing the respective arguments on the O.S, judgment was pronounced on 27<sup>th</sup> February, 2015 by Angote, J. again. On *res judicata*, he held that the issues raised in the O.S were distinct from those in the primary suit. That whereas the primary suit dealt with whether or not fraud had been perpetrated, the O.S was concerned with whether or not an informal charge existed. In addition, that the issue of fraud as decided in the primary suit showed that the fraud was perpetrated by the deceased and not the respondents and as a result, the primary suit's focus was on the question of validity of the titles as opposed to proprietorship. For these reasons, the court held that the O.S raised different issues and was thus not *res judicata* and on this premise, the court proceeded to determine the suit. Nonetheless, by the same judgment, the respondents were denied vesting orders on account of their failure to issue statutory notices. They were nevertheless left with the option of pursuing the vesting orders once they served the relevant statutory notices on the appellant.

Exposed to possible future litigation owing to this turn of events, the appellant lodged this appeal. The same challenges the judgment of 27<sup>th</sup> February, 2015 on one broad ground; *Res judicata*.

Appearing for the appellant, **Mr. Mogaka**, learned counsel, submitted that the loan, its repayment and the security tendered in respect thereof were substantial issues addressed by the learned Judge in the primary suit and the same could thus not be re-litigated. That the respondent and her late husband were both directors of the company and that in the primary suit, they were proved and found to have fraudulently transferred the suit premises to the said company, and it was as a result of this that the trial court found the transfer to be null and void and ordered its cancellation. Further, that the orders sought in the O.S could have been sought and the issues therein canvassed in the primary suit as all the facts and applicable law in the O.S were in existence and known at the time that the primary suit was heard. Counsel thus contended that parties should not be afforded the luxury of changing versions of their case at will, lest there be a multiplicity of suits and abuse of court process and should instead be held to that which they alleged at first instance. That the Judge erred in allowing the O.S to be heard because in the absence of new evidence, the matter was *res judicata* and the Judge was basically sitting on appeal of his own earlier decision, thus sanctioning an abuse of the court process. For all these propositions, counsel relied on the following authorities that we have carefully read and considered: **Ngugi v Kinyanjui & 3 others [1989] eKLR**, **Greenfield Investment Limited v Barber Alibhai Mawji, Civil, Appeal No. 160 of 1997(UR)** and **Lotta v Tanaki & others [2003] 2 E.A. 556 (CAT)**

On his part, **Mr. Kenga**, learned counsel for the respondent, associated himself fully with the judgment of the court, saying that the issues raised by the respondent in the O.S were not known to the respondent at the time the primary suit was dealt with. Counsel contended that while the primary suit was to resolve allegations of fraud, the O.S was concerned with the charge and that the two were distinct issues, meaning therefore that the defence of *res judicata* was misplaced. In addition, counsel submitted that the respondent only learnt of the existence of the charge when the judgment in the primary suit was rendered and that she cannot have been reasonably expected to plead and rely on a charge whose existence she had no prior knowledge. Finally, counsel submitted that a party cannot be estopped from raising issues that came to the fore after the prior suit. Counsel sought to anchor his arguments on the following authorities: **English White Book Service, 2003, Vol.1 page 80; Pop In (K) Ltd & others v Habib Bank Zurich [1990] eKLR** and **Ibrahim Wakhayanga & others v Peter Mubatsi Nambiro, LLR No. 5680**. He dismissed the rest of the authorities cited by the appellant as irrelevant.

This being a first appeal, this Court is obliged to re-evaluate, re-assess and re-analyze the evidence and determine whether the conclusions reached by the learned trial Judge can stand or not and to give reasons therefore (see **Kenya Ports Authority v. Kuston [2009] 2 E.A 212** and also **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR**)

The sole issue for determination in this appeal is whether or not the O.S was *res judicata*, given the proceedings in the primary suit. Under **Section 7** of the Civil Procedure Act, it is provided that:-

**“No court shall try any suit or issue in which the matter directly or 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.”**

The import of this is that the doctrine of *res judicata* seeks to ensure conclusiveness in legal proceedings, in that it bars further legal proceedings based on the same issue(s) over the same subject matter between the same parties or their proxies. In bringing an end to litigation, the doctrine ensures that a party is not vexed twice or forced to fight the same battle twice over the same cause.

Accordingly, section 7 aforesaid raises four pre requisites to be met for a matter to be deemed *res judicata*. These were defined in the case of **Uhuru Highway Development Limited v. Central Bank of Kenya & 2 others [1996] eKLR** to mean that there has to be:

1. A previous suit in which the same matter was in issue.
2. The parties are the same or litigating under the same title
3. A competent court heard the matter in issue and determined
4. The issue has been raised once again in a fresh suit.

We shall look at each in turn in relation to this case.

Was there a previous suit over the same matter?

According to the Plaintiff in the primary suit, the appellant sought *inter alia*:-

“(a) .....

**(b) An order that the 2<sup>nd</sup> Defendant do forthwith surrender to the Land Registrar Mombasa (4<sup>th</sup> Defendant) the original certificates of title and deed plans held in respect of title numbers CR 18142- Subdivision No 848/III/MN, CR 18143-Subdivision No. 849/II/MN, CR 18144-Subdivision No. 850/III/MN and CR 181146- Subdivision No. 852/III/MN for immediate rectification by cancellation and deletion of entry No. 3 made on 03<sup>rd</sup> July, 2012 from the Land Registry records and the certificates of titles in respect of the suit properties and any subsequent entry thereto that deprives or restricts the plaintiff’s proprietary interest therein.**

**(c) An order that the 3<sup>rd</sup> Defendant do forthwith surrender to the Land Registrar Mombasa (4<sup>th</sup> Defendant) the original certificates of title and deed plans held in respect of title numbers (sic) CR 18145- Subdivision No. 851/III/MN for immediate rectification by cancellation and deletion of entry No. 3 and 4 made on 03<sup>rd</sup> July, 2012 and 18<sup>th</sup> July, 2012 respectively from the Land Registry records and the certificates of titles in respect of the suit properties and any subsequent entry thereto that deprives or restricts the plaintiff’s proprietary interest therein.**

- d. That prayers (b) and (c) to be complied within (sic) ten [10] days from the date of order failing which (sic) the 4<sup>th</sup> Defendant do cancel all entries in the register entered on 03<sup>rd</sup> July, 2012 onwards and issue in favour of the plaintiff provisional certificates of titles in respect of the suit properties particularly title numbers CR 18142- Subdivision No 848/III/MN, CR 18143-Subdivision No. 849/II/MN, CR 18144- Subdivision No. 850/III/MN, CR 18145- Subdivision No. 851/III/MN and CR 181146- Subdivision No. 852/III/MN.(Emphasis added)**

Undoubtedly, that suit revolved around the issue of who had the right of title to the suit premises and why. According to the appellant, she was entitled to ownership of the suit premises on account of having purchased them, the fraudulent transfers to the company notwithstanding. But according to the respondents, title in the suit premises lay with the company on account of its having purchased the suit

premises from the appellant. These were conflicting interests or claims over the same suit premises for which there could only be one ultimate victor. The question of whether or not the titles should be surrendered as claimed could not have been determined without the court first looking at the parties' rights in relation to the suit premises. For it is only parties with ascertainable rights that can enforce them. In a dispute where the appellant asserted valid title to the premises and alleged fraudulent transfer of the same by the respondents and the third party, the court was being invited to interrogate the impugned transfers and based on the evidence, establish whether the same was proper or not. Whichever way it found, it had to determine in whom the suit premises vested, so as to determine the appropriate remedy regarding who should have possession of the title (documents) and why. The issue of fraud could not be determined in a vacuum.

Indeed, the Judge appreciated this fact when he held in part in the primary suit that:-

**“... I find and hold that the transfer of the suit properties to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were a nullity. Those transfers cannot be allowed to stand and should be cancelled forthwith from the register. The 2<sup>nd</sup> Defendant did not have any valid title to pass to the 3<sup>rd</sup> Defendant.”**(Emphasis added)

In light of the above, the proposition now being made by the respondents that proprietorship of the suit premises was a new issue before the court is erroneous without any merit. Equally erroneous is the holding by the learned Judge in the O.S. that:

**“Indeed this suit is meant to conclusively deal with the proprietorship (sic) rights of the applicants and the respondent in respect to the suit properties viz a viz the loaned amount of Kshs.800,000.”**

In our view, this was erroneous because even in her pleadings in the primary suit, the appellant had not only pleaded the existence of a loan between the parties, but had also asserted her right of ownership to the suit premises.

Were the previous proceedings between the same parties? It is common ground that the 1<sup>st</sup> respondent together with the deceased, were directors in the company. Upon the deceased's demise, the 1<sup>st</sup> respondent by her own admission finalized the transfer process and obtained titles in favour of the company. It is thus not in doubt that in the primary suit, the company fitted the description of a party under whose title the respondents could claim or litigate.

On the third issue, there is no dispute that the primary suit was heard and determined by a court of competent jurisdiction.

Having placed the respondents in the primary suit proceedings, did the O.S purport to raise similar issues as the primary suit?

There is an assertion by the respondents that the O.S was to determine whether or not a charge existed and that was based on new information that came to their knowledge after the determination of the primary suit. According to the appellant however, nothing could be further from the truth, as the existence of the loan was a live issue which was determined in the primary suit. The appellant contends and rightly so in our view, that even then the respondents knew of the loan and had they been desirous of enforcing their rights as a chargees, nothing barred them from raising a counterclaim in that regard. That doing so later on through the O.S amounted to an abuse of court process as the matter was by then, *res judicata*. Of importance here is that a party cannot in subsequent proceedings, raise a ground of claim or defence which upon the pleadings or the form of the issue was open to him in former proceedings. This is the position echoed in **Halsbury's Laws of England, vol 15 at para. 360**. It is also a position which was upheld by this Court in the case of **Wakhayanga & 2 others v. Nambiro** (Supra); in which a party who had a cause of action in adverse possession had failed to litigate thereon in its previous proceedings, opting instead to allege and plead fraud against his adversary. In a subsequent suit on adverse possession over the same subject matter and between the same parties, they were held to be precluded from raising

adverse possession on account of *res judicata*.

The totality of the above is that *res judicata* envisions not just issues that were directly before the court previously, but also covers facts or issues which, as aptly stated by Severell L.J in **Greenhalgh v. Mallard [1947] 2 All E.R 255, 257** are: “so clearly part of the subject matter in the litigation and so clearly could have been raised that it would be an abuse of the process of court to allow a new proceeding to be started in respect of them”. This is particularly where the party in question had knowledge of such facts at the time the previous proceedings were undertaken. (Emphasis provided)

In the present case, Mr. Mogaka refuted the respondents’ purported ignorance of the loan/ charge, saying that even the proceedings pointed to their knowledge of the loan. Indeed, even in the 1<sup>st</sup> respondents’ own testimony, she alluded to a meeting in her house between her deceased husband, herself, the appellant and her husband where they discussed the repayment schedule of the loan. It was finally agreed that the appellant would pay to the respondents Kshs.15,000,000/- in full and final settlement of the loan inclusive of the interest but in three instalments. The respondent cannot therefore be heard to say that the existence of a loan between the deceased and the appellant was a new matter not within her knowledge during her defence of the primary suit. So that for the respondents to reiterate that they only learnt of the loan/charge after judgment in the primary suit was rendered and could only thus pursue their rights as chargees via separate proceedings as they did in the O.S. clearly demonstrates their lack of candour. This is how the 1<sup>st</sup> respondent put it in her testimony:-

**“... When I came to court, I was defending my husband’s right over the loaned amount of Kshs.800,000/-. I am aware of the issue of the loan having been discussed between Constabir and my late husband in my house. The discussion was about the Kshs.800,000/- and the five titles which is the same issue now. Before my husband died, the Constabir (sic) offered to repay the loan. I was given some documents so that I can be repaid. It was an indemnity. That is after my husband’s death. .... I agree that my husband was not in the business of lending money. It is true that my husband was not a money lender and he could not have asked for interest. I never filed any suit demanding for the repayment of the money. I have never filed a case demanding for the interest lent by my late husband....”** (Emphasis added)

From the above testimony, the 1<sup>st</sup> respondent clearly knew of the loan arrangement prior to the deceased’s demise and prior to the primary suit. Parties are bound to raise all the facts known to them and upon which they rely (see. **Mburu Kinyua v. Gachini Tuti [1978] KAR 69** as cited with approval by this Court in **Jairo Angote Okonda v. Kenya Commercial Finance Company Limited [2000] eKLR.**)

For avoidance of doubt, the 4<sup>th</sup> explanation to **Section 7** of the **Civil Procedure Act** gives a wide interpretation of what constitutes a ‘matter substantially in issue’ and states that:

**“Any matter which might or ought to have been made a 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.”** (Emphasis added)

Given that the appellant had sued on the basis of the loan arrangement, seeking restoration of her titles, it would have served the respondents well to seek to be enjoined in that suit and counterclaim for declaratory orders if at all they felt equally entitled to ownership of the said suit premises as chargees. This would have prevented a multiplicity of suits based on the same issues and subject matter. The learned trial Judge thus erred in not holding as much. On a matter to determine the question of title to the suit premises, the fact that the respondents chose to pursue the rights of the deceased as a purchaser and not as chargee, did not change the fact that the proprietary interests in the suit premises were determined. This is what informed the decision in the primary suit. Any subsequent proceedings touching on ownership of the suit premises on account of the same facts were *res judicata*.

The outcome of the primary suit was a judgment directing that title documents be handed over for purposes of having the registration details cancelled and fresh titles issued in favour of the appellant. That

decree was never appealed against. However, it is common ground that the respondents are yet to comply by surrendering the title documents as ordered. Yet it would appear in the O.S, were it not for the want of statutory notices, the trial court would have readily granted vesting orders sought by the respondents. This poses the question; would this not have resulted in two conflicting orders from the same court over the same subject matter? It is precisely this absurdity that *res judicata* seeks to remedy. The respondents cannot pick and choose which portions of the judgment they want to comply with while challenging some parts of the same judgment before the same court.

Given all that we have said the answer to the other two requirements, viz that a competent court heard the matter in issue and that the issue has been raised in a fresh suit is obvious. It is for all these reasons that we are of the view that the appeal should succeed. Accordingly, we allow the appeal, set aside the judgment and decree in Malindi ELC Misc Appl No. 24 of 2014. In lieu thereof we order that the suit be dismissed with costs on account of *res judicata*. The costs of this appeal too shall be paid by the respondents.

**Dated and delivered at Malindi this 11<sup>th</sup> day of December 2015.**

**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**