REPUBLIC OF KENYA

Court of Appeal at Nyeri

Civil Appeal 28 of 2008

MARGARET MUMBI KAGIRI…………….....………….….…..….APPELLANT

AND

KAGIRI WAMAIRWE……………………….....……......………RESPONDENT

(Appeal from the whole ruling, orders and decision of the High Court of Kenya at Nyeri (Kasango J.) delivered on 11th May 2007

in

HCCC NO. 13A OF 2007)
****

JUDGMENT OF THE COURT

Margaret Mumbi Kagiri hereinafter referred to as the "appellant" filed ***High Court Civil Case No. 35 of 2007*** before the High Court sitting in Nyeri. She sued the respondent herein one ***Kagiri Wamairwe***, District Land Registrar Nyeri, the Hon. Attorney General and the Agricultural Finance Corporation as the defendants.

Her claim as against the respondent herein which is germane to this appeal was that Land Parcel No. ***NYERI/NAROMORU/627*** which was in the respondent's name was supposed to be registered in the joint names of the appellant and the respondent herein. A letter of consent to that effect had been granted by the Kieni East Divisional Land Control Board.

According to the appellant however, the respondent refused to sign the transfer forms, deserted her and attempted to sell the entire parcel of land hence the filing of the said suit. Before the said suit was set down for hearing, the respondent herein, moved the Court under ***Order VI Rule 13(1)(a) & (d)*** seeking an order that the plaint be struck out for disclosing no cause of action. That application was heard by Judge J. V. O. Juma (as he then was). He allowed it and struck out the said suit and ordered the appellant herein to pay the costs of the suit.

The appellant moved back to the High Court and filed originating Summons No. 13A of 2007 before the same Court. The Originating Summons is premised on ***Section 17*** of the ***Married Women Property Act 1882*** and ***Section 27*** and ***28*** of ***the Matrimonial Causes Act Cap 152*** of the ***Laws of Kenya***. She was seeking a determination on the following issues:-

(1) ***Whether the properties acquired by the plaintiff and defendant herein and held jointly and/or severally by both or either of them and acquired after the marriage between the plaintiff and respondent in or about the year 1956 and in particular land parcel known as***

NYERI/NAROMURU/1771 can be declared by this Honourable Court to be family asset and/or properties.

(2) Whether the family assets and/or properties mentioned in (1) hereinabove can be shared equally between the plaintiff and the respondent and/or the best mode of distribution of the aforesaid family assets and/or properties bearing in mind the circumstances of this case.

(3) Whether the defendant by himself, his agents and/or servants should be restricted by way of an injunction from alienating, transferring, encumbering and/or in any other way disposing/dealing with the family assets and/or properties aforesaid without leave or further orders of this honourable Court.

(4) That this hounurable Court be pleased to grant any such further orders or reliefs as may be just in the circumstances.

In her affidavit in support of the Originating Summons she deponed that she got married to the respondent in or about 1956 under Kikuyu Customary Law. She stated that the property in question was purchased by herself and the respondent jointly during the subsistence of their marriage and it therefore inevitably constitutes matrimonial property. She deponed at paragraph 15 of her affidavit that the respondent has been unilaterally disposing of parts of the land and utilising the proceeds for his own benefit. He is also said to have been cruel and has also deserted her and her children for over three years causing her to petition for divorce. It is for the foregoing reasons that she filed the said Originating Summons.

Once again, before the originating summons could be set down for hearing, the appellant through learned counsel *Mr. Wahome Gikonyo* raised a preliminary objection on the basis that the suit was *res-judicata* vide ***Nyeri HCCC No. 33 of 2001*** and Court of Appeal ***Civil Appeal No. 181 of 2002.***

The Court heard and upheld the preliminary objection and dismissed appellant's claim with costs for being *res-judicata*.

It is that ruling that triggered this appeal which is premised on the following grounds:-

(1) That the learned Judge of the Superior Court erred in law in entertaining the preliminary objection raised by the Respondent when the said objection did not meet the legal requirements of a preliminary objection.

(2) That the learned Judge of the Superior Court erred in law in holding and finding that the suit before her was res judicata despite the overwhelming evidence to the contrary.

(3) That the learned Judge of the Superior Court erred in law in not appreciating that the earlier suit (namely NYERI HCCC NO. 33 OF 2001 MARGARET MUMBI KAGIRI VS. KAGIRI WAMAIRWE & 4 OTHERS) touched on totally different mattes and issues thus rendering it fundamentally different from the suit before her.

(4) That the learned Judge of the Superior Court erred failing to consider that the parties in the two suits were different.

(5) That the learned Judge of the Superior Court erred in law in disregarding the fact that the causes of action in the two suits were totally different and distinct.

(6) That the learned Judge of the Superior Court erred in law in not taking into account the fact that the previous suit was struck out for failing to disclose a cause of action and that there was therefore no finding made as to render the future suit res judicata.

(7) That the learned Judge of the Superior Court erred in law in not finding that the suit before her was over the suit property as well as others that constituted matrimonial properties and that it therefore had nothing to do with the matters raised in the previous suit.

(8) That the learned Judge of the Superior Court erred in law in not appreciating that the circumstances had changed and that the appellant was within the law to file the subsequent suit.

(9) That the learned Judge of the Superior Court erred in law in not finding that in the previous suit the court has no jurisdiction to make the orders sought and therefore the subsequent suit could not be defeated by virtue of the existence of an earlier suit.

(10) That the learned Judge of the Superior Court erred in law in not finding that there was no adjudication over matters raised in the previous suit as to bar the Appellant from filing the subsequent suit especially based on the issues that were being raised therein.

(11) That the learned Judge of the Superior Court erred in law in not giving the reasons for reaching the finding that she did.

(12) That the learned Judge of the Superior Court erred in law in sustaining the preliminary objection raised by the Respondent while the same ought to have been dismissed with costs.

She entreats this Court to allow her appeal and set aside the said ruling. She prays that the preliminary objection be dismissed and that her case proceeds for hearing on merit. She also prays that the interim orders of injunction which had been issued in that matter be reinstated.

When the appeal came before us for hearing on 5th July 2012, the respondent applied for an adjournment on grounds that he had no money to hire an advocate and the one that had agreed to represent him *pro bono* was engaged elsewhere. The Court declined to grant an adjournment for reasons given in its ruling made the same day. The appeal therefore proceeded with learned counsel *Mr. Waitindi Kahiga* representing the appellant while the respondent appeared in person. We note however that he understood the issues before the Court very well and responded to learned counsel's submission sufficiently.

The gravamen of the appellant's appeal is that the learned Judge erred in finding the originating summons *res judicata* while indeed it was not. He submitted that the requirements of ***Section 7*** of the ***Civil Procedure Act*** had not been met; that the orders sought by the appellant in the originating summons were different from those sought in ***High Court Civil Case No. 33 of 2001*** and that the parties were also different.

On his part, the respondent maintained that the parties in the High Court Suit and the Appeal and the Originating Summons were substantially the same; that the suits related to the same subject matter and that the orders the applicant was seeking are the same.

The only issue before us is whether Nyeri HCCC No. 13A of 2007 (O/S) was *res judicata* Nyeri HCCC No. 33 of 2001 and Civil Appeal No. 181 of 2002.

What then is res judicata? ***Section 7*** of the ***Civil Procedure Act provides***:-

"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."

According to learned counsel for the appellant, the parties in the earlier suit included the District Land Registrar, the Attorney General and the Agricultural Finance Corporation who were not parties in the Originating Summons. He also urged that the prayers in the two suits were different and so the originating summons was not ***res judicata***

Let us first consider whether the parties in both suits were the same. Clearly, the only common defendant in both suits was the respondent herein. The other three defendants are different. They are not parties to

the Originating Summons as the appellant has no claim against them. Can the parties in the two matters therefore be said to be substantially the same? In this case, we must agree that the appellant and the respondent were both parties in the Civil Suit and they are the parties in this Originating Summons. This on its own however, does not render the suit *res judicata* unless the issues between the appellant and the respondent were the same ones raised in the former suit.

In the former suit, the appellant's prayers were:-

(1) A declaration that the lifting of the plaintiff caution on parcel Number Nyeri/Naromoru/627 and the subsequent subdivision of the aforesaid title and transfer and issuance of title on land parcel number Nyeri/Naromoru/1769, Nyeri/Naromoru/1770, and Nyeri Naromoru/1771 and also the charge on the subdivision titles was unlawful and fraudulent.

(2) An order of cancellation of Title Numbers Nyeri/Naromoru/1769, Nyeri/Naromoru/1770, and Nyeri/ Naromoru/1771 and reinstatement of the original title Number Nyeri/Naromoru/627 and the caution.

(3) A declaration that the title Number Nyeri/Naromoru/627 is the joint property of the plaintiff and the first defendant and an order that the Title Number Nyeri/Naromoru/627 be transferred in the joint names of the plaintiff and the first defendant and in the event of a refusal by the first defendant to execute transfer documents the Deputy Registrar of this honourable Court authorised to do so.

In the Originating Summons, which is under ***Section 17*** of the ***Married Women Property Act*** she has sought orders that are specific as against the respondent herein and not the other defendants in the earlier suit as enumerated elsewhere in this ruling.

The pertinent question that begs an answer is whether the claim for declaration of the plot in question as matrimonial property and the distribution of the same between the appellant and the respondent could have been pleaded and canvassed in the former suit.

If it could have been so dealt with, then the appellant herein would be caught up with by explanation (4) of ***Section 7*** of the ***Civil Procedure Act*** which provides:-

"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."……..

In which case the Originating Summons would have been *res judicata*.

As observed earlier on in this ruling, there were other defendants in the earlier suits who are not parties in this originating summons. The claim herein has nothing to do with them. It is also worth noting at this point that the earlier suit was by way of plaint. The entitlement to the land the appellant herein was claiming in that suit was based on a Land Control Board consent where the Land Control Board had ordered that the land be subdivided and be registered in the joint names of the appellant and the respondent.

The Superior Court held and in our view correctly so that the Land Control Board had no power to award people land. This Court differently constituted upheld the decision of the Superior Court and cited the case of ***Gatere Njamunyu ~Vs~ Jose K Njue Nyaga*** ***[1982 – 1988] 1 KAR 123*** where the court held at page 125 3rd paragraph:

"Consent does not impose any obligation upon the seller or buyer to perform the agreement, though it cannot be performed without it. The parties are free to cancel the agreement mutually even after consent and proceed to completion. A party to the agreement may also rescind the agreement but he does so at his own peril. The cancellation or rescission of the agreement as aforesaid is not prohibited because consent has been given. Consent has no bearing upon it…."

The Court thus dismissed her claim observing that the appellant's claim was based on the Land Control Board consent and that there was no further explanation given as to the basis of that consent.

The Court also went further and stated:-

"Again if the appellant's claim was based on the fact that she was the wife of the first respondent that claim was bound to fail too."

That observation by the Court must nonetheless be construed within the strict circumstances of that case – meaning that the appellant could not ride on the consent of the Land Control Board to claim any rights over the land in her capacity as a wife. She was not seeking a declaration that the suit land was matrimonial property under the Married Women Property Act. Her claim as a wife could not and was not therefore canvassed in the earlier suit.

The point we have now been called upon to determine in this appeal is whether the appellant was within the law to thereafter file the originating summons and seek a declaration that the property was matrimonial property. Could she have included this prayer in her earlier suit which was by way of plaint? Our finding is that she could not do so. Firstly, the case also involved the other defendants who had nothing to do with her present prayers, and there could have been serious misjoinder of the parties.

Secondly, even the mode of moving the Court in that suit and in the originating summons is basically different. Those in our view can be said to fall under "special circumstances" as contemplated in the *locus classica* case of ***Henderson ~VS~ Henderson*** ***[1843] Hare 100 at 115*** where Wigram VC stated:-

"Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest but which was not brought forward, only because they have, from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

In this case, we find that the determination of whether the suit land was matrimonial property or not could not have been raised in the earlier suit and that would therefore fall under "special circumstances." There were also change of circumstances in that during the first case, the parties herein were still husband and wife (though the respondent is described as "estranged husband") while as at the time the originating summons was filed, the appellant herein had already filed a divorce.

This Court also observes that the originating summons would include other properties obtained by either party during coverture and is not just restricted to the property which was the subject matter of the former suit. The latter claim in our considered view formed a totally different cause of action that could not have been adjudicated in the former suit.

Even if we are wrong on this, under Section 7 of the Civil Procedure Act reproduced herein above, a matter is res judicata if it "***has been heard and finally decided***" in an earlier suit. A matter is not heard and finally decided unless it is heard and determined on its merits. In other words a matter is not res judicata unless the earlier decision was based on a hearing of the suit on its merit. See this Court's decisions in **Kibogy v. Chemweno [1981] KLR 35** and **Wanguhu v. Kania [1987] KLR 51**. This court's observation that "even if the appellant's claim was based on the fact that she was the wife of the first respondent that claim was bound to fail too'' was, with profound respect, unfortunate and obiter. It does not therefore affect the issue of res judicata that is before us now.

We do therefore find that the claim in the originating summons is not res judicata as the earlier case was dismissed as disclosing no cause of action. The learned Judge therefore erred in sustaining the

preliminary objection. He should have overruled it and allowed the originating summons to go to full hearing on its merits.

We are also in agreement with learned counsel for the appellant’s ground 11 of the Memorandum of Appeal that the learned Judge of the Superior Court albeit analysing the facts and case law cited by both counsel failed to give reasons for her decision.

We have carefully considered the respondent’s response which as we stated earlier was very coherent and to the point. We nonetheless come to the conclusion that other than the names of the parties herein and the land in question in the two suits, there are some issues which were not covered by both suits and which could not have been canvassed in the HCCC No. 33 of 2002. The appellant should not be locked out of the justice system before she is given an opportunity to be heard on her claim on the matrimonial properties. Whether she can establish her claim or not is a different issue altogether which does not concern us in this appeal. That decision should be arrived at by the court that will hear her originating summons. For the foregoing reasons, we are satisfied that this is a good appeal. We allow the same with costs and grant the orders sought in the memorandum of appeal dated 23rd January 2008.

Dated and delivered at Nyeri this 25th day of October, 2012.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

……………………….……..
JUDGE OF APPEAL

D. K. MARAGA

....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR