



Mulima ((Suing on behalf of Benjamin Okwaro Ojode)) v Odiro (Environment and Land Appeal E008 of 2022) [2024] KEELC 4844 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4844 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E008 OF 2022**

**AY KOROSS, J
JUNE 20, 2024**

BETWEEN

**WILLIAM OJODE MULIMA APPELLANT
(SUING ON BEHALF OF BENJAMIN OKWARO OJODE)**

AND

JOHN MAURICE ODIRO RESPONDENT

(Being an appeal against the judgment of the Hon. SRM C.I. Agutu delivered on 24/02/2022 in Ukwala PM ELC Case No. 10 of 2020)

JUDGMENT

Background of the appeal

1. To contextualize this appeal, before the trial court, the appellant who was the plaintiff, donated a power of attorney to his father William Ojode Mulimia (William), and when William died in the course of the appeal, the appellant proceeded in prosecuting his appeal. In the trial court, the respondent was the defendant.
2. At the center of contestation was land parcel no. North Ugenya/Ndenga 1225 (suit property) that is allegedly registered in the appellant's name and ostensibly occupied by the respondent.
3. In a plaint dated 4/02/2020, the appellant contended the respondent had in April 2016, unlawfully trespassed onto the suit property. The appellant particularized acts of trespass against the respondent and sought orders of vacant possession and costs of the suit.
4. This claim was spiritedly contested by the respondent's defence dated 30/07/2020 and apart from denying some of the appellant's averments, he asserted the dispute had been conclusively determined in Siaya Land Dispute Tribunal Case No.26 of 2010 (tribunal case) which was adopted as an order



of the court on 5/10/2010 and the suit property's title document was ultimately canceled. In other words, the suit was res judicata.

5. The matter was slated for hearing and both parties testified and produced documents in support of their cases. The appellant's case was led by Fredrick Oduor Opondo who is the respondent's brother and testified as PW2.
6. Upon closing parties' cases and submissions being filed, the trial court reserved the suit for judgment. In the challenged judgment, the learned trial magistrate found that the suit was res judicata and downed her tools.

Appeal to this court

7. Dissatisfied with the impugned judgment, the appellant moved this court on 4 grounds of appeal set out in the memorandum of appeal dated 17/03/2021 faulting the learned trial magistrate on grounds inter alia: -
 - a. The learned trial magistrate failed to hold in favour of the appellant despite overwhelming evidence proving his case.
 - b. The learned trial magistrate erred in law and fact in finding the suit was res judicata yet the appellant was not privy of the previous case.
 - c. The learned trial magistrate erred in law and fact by failing to analyze the evidence adduced before her and failed to render a reasoned judgment contrary to the provisions of Order 21 Rule 4 of the Civil Procedure Rules.
 - d. The judgment of the learned trial magistrate was against the adduced evidence.
8. In the memorandum of appeal, the appellant urged this court to set aside the trial court judgment and substitute it with an order allowing the appellant's case with the costs of the appeal and the lower court suit.

Parties' submissions

9. The appeal was canvassed by written submissions and the appellant's law firm on record M/s. Ooro & Co. Advocates filed written submissions dated 27/02/2023.
10. The appellant condensed grounds 1 and 4 into one ground and grounds 2 and 3 into a singular ground and identified two issues for resolution by this court - whether the appellant adduced sufficient evidence to prove his case to the required standards and whether the judgment of the trial court complied with the provisions of Order 21 of the Civil Procedure Rules. It is observed the counsel did not rely on any judicial precedents but relied on legal provisions to anchor his arguments.
11. The respondent's law firm on record Ms. Charles Ochieng Advocates filed written submissions dated 27/02/2023. The respondent's submissions identified the following 2 issues as arising for resolution; whether the appellant had a valid title deed and whether the orders sought by the appellant could be granted. To buttress his arguments, the counsel relied on legal provisions and several legal authorities.
12. Upon identifying and considering the issues for determination, this court will in its analysis and determination consider the respective counsel's arguments on the particular issue and also consider provisions of law and legal authorities they relied upon to advance their respective arguments.



Preliminary issue

13. However, before I proceed, I must address certain preliminary issues that emerged from the appellant's grounds of appeal and respondent's submissions.
14. The ground of appeal that questioned the legality of Siaya PM Land Tribunal Case No. 26 of 2010 that was between the respondent as claimant and PW2 as objector (previous case) was never the subject of determination before the trial court.
15. The respondent too was not left behind, he introduced two new pieces of evidence on appeal which were the issues of locus standi and intermeddling with the estate of a deceased person.
16. All these issues new issues raised by counsels on appeal were never subjected to determination by the trial court and since they were never pleaded, canvassed, raised, or succinctly made issues before the trial court to enable it to exercise its mind upon them, they will be disregarded. See Kenya Hotels Ltd vs. Oriental Commercial Bank Ltd (Formerly known as The Delphis Bank Limited) [2019] eKLR.

Issues for determination

17. Being a 1st appeal, the power of this court is set out in Order 42 Rule 32 of the Civil Procedure Rules. Being an appellate court, this court will not interfere with the impugned judgment save this court satisfies itself the learned trial magistrate misdirected herself and thus arrived at an erroneous decision, undoubtedly exercised her discretion wrongly and occasioned injustice by such erroneous exercise.
18. The role of an appellate court was aptly stated in the decision of Watt v Thomas [1947] AC, 484 at p 485 which was cited with approval in the Court of Appeal decision of Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] eKLR thus: -

“Lord Simon's speech in Watt v Thomas [1947] AC, 484 at p 485 as follows:

“....an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide.

But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight...”

19. Reminding myself of the role of an appellate court, I have carefully considered the records and parties' rival submissions, provisions of law and authorities relied upon and the following 4 issues commend themselves for determination: -
 - a. Whether the impugned judgment complied with the provisions of Order 21 Rule 4 of the Civil Procedure Rules.
 - b. Whether the learned trial magistrate erred in finding the suit was res judicata.
 - c. If (b) is in the affirmative, whether the appellant proved his claim of trespass.
 - d. What orders should this court issue including an order as to costs?



Analysis and determination

20. The foregoing issues shall hereafter be dealt with consecutively: -

a. Whether the impugned judgment complied with the provisions of Order 21 Rule 4 of the Civil Procedure Rules.

21. Counsel for the appellant contended the impugned judgment did not comply with the provision of Order 21 Rule 4 of the Civil Procedure Rules and argued that this was a fatal error. The respondent's counsel absconded from addressing this issue. This provision of law provides as follows: -

“Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.”

22. I agree with the appellant's counsel that the judgment was wanting and its one-pager did not contain a succinct summary of the case or points for determination but nosedived into the point of law that touched on the court's jurisdiction. The judgment was rendered in the following verbatim words: -

“This matter was determined by his honourable S.O Temu, Resident Magistrate as he then was in 2016 at Siaya Court in hand (sic) of dispute tribunal case number 26 of 2010. The parties were John Maurice Odiro (Claimnant) (sic) The present defendant verses (sic) Fredrick Oduol Opondo (Objector). The order is herein attached peasual (sic). The issues in this case were determined in the above quoted case and if the parties are not satisfied then they can initiate the appeal process.”

23. Unquestionably, the impugned judgment did not comply with Order 21 Rule 4 of the Civil Procedure Rules which is couched in mandatory terms. So where does that leave us in the circumstances of this case?

24. Recourse can be found in Section 78 of the [Civil Procedure Act](#) which outlines the authority of an appellate court in the following terms: -

“(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

- (a) to determine a case finally;
- (b) to remand a case;
- (c) to frame issues and refer them for trial;
- (d) to take additional evidence or to require the evidence to be taken;
- (e) to order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

25. The appellant has not urged this court to frame issues and refer them for retrial or sought an order for retrial but rather for this court to determine the case with finality.



26. My understanding of this is that counsel has considered the overriding objective of civil litigation which is to forestall hardship, expense, and delay, and he is confident the evidence on record is sufficient to enable this court to deal with the issues with finality.
27. Counsel's position is not new and the Court of Appeal when faced with a ground of appeal that challenged the judgment of the trial court which contravened Order 21 Rule 1 of the Civil Procedure Rules for being rendered over 2 years after the close of the parties' cases instead of rendering it within the statutory period of 60 days reasoned thus in *Gilgil Telecoms Industries Limited v Duncan Nderitu & 57 Others* (2016) eKLR:-

“This Court in *Johnson M. Mburugu -vs- Fidelity Shield Insurance Company Ltd* [2006] eKLR while discussing Order XX Rule 1 of the former Civil Procedure Rules which like Order 21 Rule 1 of the current Civil Procedure Rules provided for the time frame within which a decision ought to be rendered expressed;

“...This Court considered a similar situation in the case of *Nyagwoka Ogora alias Kennedy Kemoni Bwogora -vs- Francis Osoro Maiko – Civil Appeal No. 271 of 2000* (unreported) and had the following to say:

“The real question is what is the consequence of non-compliance therewith? No doubt that rule is an important one in the expeditious dispensation of justice. And it is made to be obeyed. However, if non-compliance with the rule were to have the effect contended for by the appellant, we think the overall result would be more injustice than justice to the parties. A lot of time and resources spent in litigation would come to naught if judgments delivered after the expiry of 42 days were to be voided or declared void *IPSO facto*. The rule cannot and in our view could not have been intended to deprive a trial judge of his jurisdiction to write and pronounce judgment in a case he has heard. In our considered view, while non-compliance with the rule and particularly persistent non-compliance or inordinate delay in compliance should call for censure of the judicial officer concerned from those in-charge of judicial administration, it should not be a ground for vitiating a duly delivered judgment.”

28. The Civil Procedure Rules is silent on non-compliance and since the appellant is confident with the sufficiency of the evidence and a careful perusal of the records reveals the evidence is readily available, I am confident I can reassess the evidence, pleadings, and the law and arrive at my independent deductions.

b. Whether the learned trial magistrate erred in finding the suit was *res judicata*.

29. The appellant's counsel tiptoed around this issue and merely submitted that in the tribunal case and previous case, parties were not the same and the appellant did not participate therein. On this issue, the respondent's counsel merely concurred with the impugned judgment. Therefore, I have to analyze the law and consider the evidence before arriving at my findings.



30. The legal framework of the doctrine of res judicata is set out in Section 7 of the [Civil Procedure Act](#) which stipulates as follows: -

“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.”

31. The essence of the doctrine is that it bars a party from relitigating matters already determined on facts by a competent court. It brings litigation to finality and affords parties closure and respite from the spectre of being vexed with multiple suits that have already been determined by a competent court.

32. The intent of the doctrine is aptly summarized by the Supreme Court of Kenya decision of John Florence Maritime Services Limited & another vs. Cabinet Secretary, Transport and Infrastructure & 3 others [2021] eKLR as follows: -

“It is primarily founded on the following three maxims:

- (1) nemo debet bis vexari pro una et eadem causa: no man should be vexed twice for the same cause.
- (2) interest republicae ut sit finis litium: it is in the interest of the State that there should be an end to a litigation; and
- (3) res judicata pro veritate occipitur: a judicial decision must be accepted as correct.”

33. The decision of the learned trial magistrate which was emphasized earlier in this judgment did not analyze the principles of res judicata but simply stated the case herein had already been determined by another case. Consequently, I have to relook at the evidence and applicable principles.

34. Since res judicata is a matter of fact, I am called to revisit and interrogate the previous cases. Thus, in doing so, I will seek to establish if the suit that was before the trial court fell on all fours on the doctrine of res judicata.

35. For the doctrine of res judicata to suffice, it must be on a previous suit in which the matter is in issue, the parties were the same or litigating under the same title, a competent court heard the matter in issue and the issue has been raised once again in a fresh suit.

36. The appellant’s counsel did not challenge the applicability of these principles of res judicata to the circumstances of the case save that the appellant was never a party to the previous proceedings. To this extent, I agree with him.

37. The tribunal case which was adopted by the previous case cancelled the suit property’s title and that of “1225” which were subdivisions of land parcel no. North Ugenya/Ndenga 892 (mother parcel) and reverted it to the mother parcel.

38. Consalate Adhiambo Ayucha (Consalate) was awarded 2/3 of the mother parcel and the respondent and PW2 were jointly awarded 1/3 thereof. As of 21/03/2016, the said judgment was in the process of being implemented. None of the parties led evidence if the suit property’s title still subsists.



39. Be that as it may, although the appellant's counsel argued the appellant was not a party to the previous case, he failed to advance his argument on the 2nd limb of this principle- whether the previous case was between parties under whom the appellant could claim.

40. By explanation 6 of Section 7 of the Civil Procedure Rules, counsel's contest cannot pass the test. This provision of law states as follows: -

“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.”

41. From the tribunal proceedings and this case, it emerges the appellant had purchased the suit property from either Consalate or PW2 or both and his claim over the suit property was derived from them. Indeed the tribunal made the following judgment: -

“From the foregoing findings, 2/3 share of the original land parcel

Number Ugenya/Ndenga/892...goes to Consolata Adhiambo Ayucha and her 3 children i.e. 3.07 ha and that the portion which had been sold to Benjamin Okwako be removed from this share, and should be worked out as appropriate.”

42. Thus, I arrive at the same conclusion as the learned trial magistrate that the suit was res judicata, and as a result, it is unnecessary to address issue (c).

43. Ultimately, I find and hold that this appeal is devoid of merit. I hereby dismiss it and uphold the judgment of the learned trial magistrate delivered on 24/02/2022. Accordingly, the appeal fails and is hereby dismissed. It is trite law costs follow the event, and costs are awarded to the respondent.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 20TH DAY OF JUNE 2024.

HON. A. Y. KOROSS

JUDGE

20/6/2024

Judgment delivered virtually through Microsoft Teams Video

Conferencing Platform in the Presence of:

N/A for appellant.

Mr. Ooro F. h/b for Mr. Charles Ochieng for respondent

Court assistant: Ishmael Orwa

