



IN THE COURT OF APPEAL

AT NAKURU

CIVIL APPEAL 261 OF 2002

DANIEL KIRUI 1ST APPELLANT

KIPSINENDE FARM CO. LTD 2ND APPELLANT

AND

MONICAH W. MACHARIA 1ST RESPONDENT

COMMISSIONER OF LANDS 2ND RESPONDENT

(Being an appeal from the ruling and orders of the High Court of Kenya

Nakuru (Visram J.) dated 30th July 2002 in H.C.C.C. NO.17 OF 2001

JUDGMENT OF THE COURT

Peter Macharia, was the plaintiff in Nakuru High Court Civil Case No.278 of 1996, in which the Attorney General and Kipsinende Farm Limited, were named the defendants. The Attorney General was named as defendant on behalf of the Commissioner of Lands. The dispute in that suit concerned the ownership of a parcel of land known as L.R. No. Nakuru Municipality/Block 6/142. The plaintiff had been allotted the land by the Commissioner of Lands by a letter dated 23rd July, 1992, which allotment was however, cancelled by another letter from the same Commissioner of Lands dated 19th January, 1993. The plaintiff sought for, among other prayers, that he be declared as owner of the said property.

Before the suit was concluded the plaintiff died and Monicah Wamuhu Macharia, was joined as legal representative of his estate. The suit was heard and dismissed with costs. Thereafter, Monicah Wamuhu Macharia, brought fresh action against Daniel Kirui, Kipsinende Farm Company Ltd and the Commissioner of Lands. Daniel Kirui was described in the plaint as an employee of Kipsinende Farm Company Limited. The principal claim in the suit was a declaration that title No. Nakuru Municipality Block 6/142, registered in the name of Kipsinende Farm Company Ltd (the company), is held in trust by the said company for the plaintiff and that the former had no legal title whatsoever which could have been conferred on it by the Commissioner of Lands.

In their joint statement of defence Daniel Kirui and the company raised, among other defences, **res judicata**. Thereafter both defendants applied under **Order VI rule 13 (1)(b) and (d)** of the **Civil Procedure Rules** seeking an order that that suit be struck out, or be dismissed with costs. Visram J. heard the application but did not think the plaintiff's suit was **res judicata**. In his ruling, he rendered himself, in pertinent part, thus:

“Although the plaintiff in this case was a party to the earlier case, she was so in a completely different capacity than she is here. In the earlier case, she was party thereto as the legal representative of the deceased. She is party here in her individual capacity. The case cannot, therefore, be said to be res judicata in view of the earlier case filed by her deceased husband.”

The appellants were aggrieved and hence this appeal. Only one issue was canvassed before us. The issue was whether the later suit was barred by *res judicata*.

Section 7 of the Civil Procedural Act Cap 21 Laws of Kenya, provides as is material for this judgment, thus:

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

It was common ground that the earlier suit and the subsequent suit concerned the same property. It was also common ground that the defendants were essentially the same in both suits. The dispute in both suits concerned title to that property. In the earlier suit Peter Macharia claimed title to this property as a direct allottee of the property by the Government of Kenya to compensate him for his own land which had been compulsorily acquired by the Government for the benefit of Baringo High School. Likewise Monicah Wamuhu Macharia, averred in her plaint that the suit land had been allocated to her *“pursuant to compensation by the Commissioner of Lands under the Land Acquisition Act after the Commissioner of Lands had compulsorily acquired the plaintiff’s piece of land next to Baringo High School at Eldama Ravine for purposes of expansion of a public school.”*

Mr. Kahiga, for Monicah, conceded that her claim and that of her deceased husband have the same source in so far as the subject-matter is concerned. His submission was that in the husband’s case the issue of trust was not canvassed or decided upon. With due respect to counsel, the important consideration is not the individual prayers in the respective plaints of the two suits, but the substantial issue in each suit. The substantial issue in both suits is who between the plaintiff and the Kipsinende Farm Company Limited was entitled to the suit property? That was the substantial issue in the former suit, and was also the direct and substantial issue in the later suit. Monicah could not possibly claim a right to the property whether as allottee or otherwise, on her own right without reference to her husband. Otherwise, it cannot be that the allotment was made both to her and her husband at the same time for the loss of a designated piece of land.

Besides, as rightly pointed out by Mr. Karanja for the appellants, under **section 7(4)** of the Civil Procedure Act *res judicata* affects even those matters which should have but were not made part of the claim in the earlier suit are deemed to have been substantially and directly in issue in such suit. If the issue of trust was raised, then the respondent should not be heard to say, the issue was not canvassed. The failure to canvass the issue could only be blamed on the claimant not the defendant.

In view of the conclusion we have come to, above, it is our judgment that **Civil Suit No.17 of 2000** in which the respondent Monica Wamuhu Macharia, was the plaintiff was barred *by res judicata* and Visram J. erred in not striking it out. In the result, we allow this appeal, set aside the order of Visram J. dated 30th July 2002, and substitute therefor, an order striking out **Nakuru High Court Civil Case No.17 of 2000** with costs. We award the costs of this appeal to the appellants against the 1st respondent, in view of the fact that the 2nd respondent did not take part in this appeal. It is so ordered.

Dated and delivered at Nakuru this 30th day of March 2007

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR