REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appeal 102, 256 & 267 of 1998

ROBERT M. MUGA .....APPELLANT

AND

MUCHANGI KIUNGA .....RESPONDENT

FRANCIS KIRAGU MURIUKI..... 2ND RESPONDENT

MOFFAT MAINA MUCHANGI..... 3RD RESPONDENT

(An appeal from the decision and order of the High Court of Kenya at Nairobi (Bosire, J.) dated 11th June, 1996

in

H.C.C.C. NO. 1686 OF 1994 (O.S)

****

IN CONSOLIDATION

WITH

Civil Appeal 256 of 1998

BETWEEN

MUCHANGI KIUNGA .....IST APPELLANT

FRANCIS KIRAGU MURIUKI ..... 2ND APPELLANT

MOFFAT MAINA MUCHANGI ..... 3RD APPELLANT

AND

ROBERT M. MUGA .....RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at Nairobi (Githinji, J.) dated 18th September, 1998

in

H.C.C.C. NO. 2031 OF 1998)

****

AND

IN CONSOLIDATION

WITH

Civil Appeal 267 of 1998

BETWEEN

ROBERT MUGA ..... APPELLANT

AND

MUCHANGI KIUNGA .....RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Nyeri (Osiemo, J.) dated 19th July, 1996

in

H.C.MISC. APPLICATION NO. 61 OF 1996)

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JUDGMENT OF THE COURT

1. On 22nd December, 1998 this Court ordered that these three appeals, being Civil Appeals Numbers 102 of 1998, 256 of 1998 and 267 of 1998 be consolidated and heard together for convenient disposal since the main issues in dispute in the three appeals relate to the same land and all the issues of law raised therein are common to the said appeals.

2. The dispute between the parties is protracted and has a long history. The cause of action arose in 1960 and has been in court since 1971. It is akin to the case of **Jarndyce and Jarndyce (1853)** narrated in ***Charles Dickens's*** most wide – ranging and symbolic novel ***Bleak House***, which was set in the world of Chancery. The case, which was originally brought to settle a dispute over a Will, had been running in court for generations and had used up a great deal of health and wealth in its course. During its pendency the suit had become so complicated that no man alive knew what it meant. The parties to it understood it least. The Chancery lawyers could not talk about it for five minutes without coming to total disagreement as to all the premises. Innumerable children had been born to it and innumerable young people had been married into it. Scores of persons had deliriously found themselves made parties in **Jarndyce and Jarndyce** without knowing how or why. A long procession of judges had come and gone. But **Jarndyce and Jarndyce** still dragged its dreary length before the Courts, perennially hopeless. It had passed into a joke.

3. According to the records placed before us, the dispute giving rise to the appeal revolves around land parcel number Mwerua/Mukure/23 in the then Mwerua Location of Ndia Division in Kirinyanga District of Central Province, whose original proprietor was ***Muchangi Kiunga***, the 1st appellant in Civil Appeal No. 256 of 1998 and the respondent in Civil Appeals Nos. 102 of 1998 and 267 of 1998. We shall hereinafter refer to him as ***Kiunga***.

4. ***Robert Muga*** is the appellant in Civil Appeals Nos. 102 of 1998 and 267 of 1998 and the respondent in Civil Appeal No. 256 of 1988. We shall hereinafter refer to him as ***Muga***. It is his case that on or about 3rd April, 1960 he entered into a Sale Agreement with ***Kiunga*** by which ***Kiunga*** was to sell to him the parcel of land known as number Mwerua/Mukure/23 measuring approximately 8.7 acres, the suit land, at the agreed price of Shs.2,700/= of which sum ***Muga*** paid in full to ***Kiunga*** who immediately yielded vacant possession of it to ***Muga***. ***Muga*** avers in the suit that he has been in occupation of the suit land ever since and has improved it extensively.

5. ***Muga*** further states that he has built a permanent house on the suit land, planted tea and horticultural crops among others. He gave the estimated total value of the suit land together with all the developments thereon at about Shs.4,700,000/= as of 1998.

6. On or about 7th July, 1970, ***Muga*** and ***Kiunga*** sought consent to the sale transaction from Ndia Land Control Board. It is common ground that the application for consent was deferred because the Board imposed a condition that ***Muga*** should in addition to the purchase price, also, buy ***Kiunga*** an alternative piece of land which condition ***Muga*** promptly fulfilled. ***Muga*** states that he purchased a parcel of land known as Mwerua/Mukure/338 comprising about ten (10) acres and settled Kiunga and his family on it.

7. On his part, ***Kiunga*** avers that ***Muga*** did not fulfil his part of the bargain and therefore he was not obliged at all to transfer the suit land to him.

8. In 1971 ***Muga*** filed Nyeri SRM Civil Suit No. 32 of 1971 seeking an order for specific performance but he lost the suit before Mr. V.S. Dhir, Senior Resident Magistrate. Being aggrieved ***Muga*** preferred an appeal being Nairobi High Court Civil Appeal No. 91 of 1972. In dismissing the appeal Chesoni J (as he then was) held: -

"**By the time the suit was heard he (the appellant) admitted he had not paid the Shs.700/= (sic). Here was a man seeking an equitable remedy of specific performance and whose hands were not clean. Was he to get the remedy? I would say no. As regards the second ground the Land Control Act is clear about the time for applying for the consent. The Agreement was first made in 1960 and issued in 1963 – May. Application for consent was not made until June 9th, 1970 – seven years later, which was in violation of Section 6(2) (a) of the said Act. By that time the Agreement was void and there was nothing to support the application and consent could not have been given in vacuum. The learned Senior Magistrate was correct in holding that there was no consent of the Land Control Board."**

9. Undaunted, ***Muga*** lodged a second appeal before this Court being Nyeri Civil Appeal No. 17 of 1975. The records show that this appeal was a non-starter and was struck out it having been lodged out of time.

10. Then about eight years later ***Muga*** filed an Originating Summons in Nairobi Civil Case No. 3645 of 1983 in which he claimed an interest in the suit land this time on adverse possession. In his affidavit, he claimed that he had lived on the suit land since April, 1960 when he was given possession under a contract of sale. He further claimed to have carried out extensive development. However, all these allegations were denied by ***Kiunga*** in the replying affidavit. ***Kiunga*** in counter action filed an application for striking out the Originating Summons on the grounds of want of prosecution and of *res judicata* and O'Connor, J in a ruling dated 5th December, 1986 found for ***Kiunga*** and struck out the Originating Summons under ***Order VI rule 13*** of the Civil Procedure Rules. The records show that ***Muga*** informally applied for stay of execution but the Judge refused to grant the application stating that there was nothing to stay in the matter; and ***Muga*** being aggrieved, filed a notice of appeal on 16th December, 1986.

11. On 7th January, 1987 ***Kiunga*** appeared before Rauf J. and obtained an *ex-parte* order on an application to restrain ***Muga*** from trespassing on the suit land, the subject matter of the struck out

Originating Summons. On 23rd February, 1987 a further order was granted by O'Connor J. committing ***Muga*** to civil Jail for 48 hours for failing to comply with the *ex-parte* court order made on 7th January, 1987. A notice of appeal against the order of 23rd February, 1987 was filed on 24th February, 1987.

12. By another application, this time expressed to be brought under ***rule 5(2) (b)*** of the Court of Appeal Rules and registered as Civil Application No. Nai. 28 of 1987, ***Muga*** sought a stay of execution of the orders made on 5th December, 1986 by which the Originating Summons was struck out and also against the order made on 7th January, 1987 restraining him from trespassing on the suit land.

13. On 29th April, 1988, this Court (Nyarangi, Platt and Gachuhi, JJA) ordered: -

"**(a) That the orders made on 5th December, 1986, 7th January, 1987 and 23rd February, 1987 are hereby stayed until the final determination of the intended appeal in High Court Civil Suit No. 3645 of 1983 (O.S).**

(b) The status quo shall be maintained until the final determination of the intended appeal."

In making these orders the Court observed that as the matters stood then, ***Muga*** was aggrieved by the order of the superior court which had struck out his Originating Summons and against which he had lodged a notice of appeal, and also, "*that he was being confronted with an order restraining him from entering the land which he had developed and where he had a home."* The Court noted that ***Kiunga*** had admitted that ***Muga*** had carried out both intensive and extensive developments on the suit land.

14. On 8th June, 1989, this Court in Civil Application No. 137 of 1988 struck out the notice of appeal lodged on 8th February, 1987 and vacated the orders made on 29th April, 1988 on the ground that ***Muga*** had not taken an essential step in the proceedings.

15. While ***Muga*** was busy pursuing the appeals in both this Court and superior court ***Kiunga*** was petitioning the Senior Resident Magistrate's Court at Nyeri for ***Muga's*** eviction and for *mesne* profits which orders ***Kiunga*** easily got them *ex parte*. It would appear that total costs and *mesne* profits against ***Muga*** had been assessed and in March, 1996 they stood at Shs.170,264/15.

16. By another Originating Summons registered as Civil Suit No. 1686 of 1994 (O.S) and taken out on 10th May, 1994, ***Muga*** sought two orders of which we reproduce hereinbelow: -

"**i) THAT the said ROBERT M. MUGA the Plaintiff be declared to have become entitled by adverse possession of over twelve years to ALL THAT piece or parcel of land registered under the Registered Land Act (Cap. 300 Laws of Kenya) and comprised in title No. MWERUA/MUKURE/23 measuring 8.7 acres and situate in Kirinyaga District.**

ii) THAT the said ROBERT M. MUGA the Plaintiff herein be registered as the sole proprietor of the said piece or parcel of land known as MWERUA/MUKURE/23 in place of the Defendant MUCHANGI KIUNGA the above named Defendant."

Kiunga, on being served with the motion, moved the Court for an order striking out the Originating Summons on account of; firstly, *res judicata* and secondly; that it was an abuse of the process of the Court. Bosire J. (as he then was) on 11th June, 1996 held that O'Connor J's decision, whether right or wrong, was binding on him since it had not been vacated and declared that the suit was *res judicata*.

17. ***Muga*** being dissatisfied with Bosire J.'s decision has preferred Civil Appeal No. 102 of 1998, which is now before us and which has been consolidated with the other two. Mr. Kahonge for ***Muga*** submitted that the second suit before Bosire J. was not *res judicata* because the decision in the suit before O'Connor J. was not a decision on merit and that the learned Judge's decision was erroneous. Mr. Kahonge further contended that Bosire J. had given a restrictive interpretation and construction to

Section 7 of the Civil Procedure Act and that by doing so the learned Judge had greatly prejudiced ***Muga's*** interests.

18. It will be recalled as shown earlier in this judgment that O. Connor J. struck out HCCC No. 3645 of 1983 (O.S) under ***Order VI rule 13***. In that suit ***Muga*** was the plaintiff and ***Kiunga*** was the defendant. The two parties were also plaintiff and defendant respectively in HCCC No. 1686 of 1994 (O.S). In effect, they occupied or held the same positions in the two suits. Further, the subject matter of the dispute was the very same suit land. The facts on which ***Muga*** was relying on in the second suit were known to him at the time of the filing of the first suit. The decision by O'Connor J. could have been subjected to an appeal but ***Muga*** did not pursue an appeal against the said decision. Also, though he could have applied for a review of the decision, under ***Section 80*** of the Civil Procedure Act he did not do so. It follows, therefore, that he could only successfully institute a second suit or application if it was based on facts not known to him at the time he lodged the first suit, otherwise if the facts remained the same, or constant and were in his domain, then the second suit would be dismissed as *res judicata*, as Bosire J. correctly so, in our view, did. See **Mburu Kinyua v Gachini Tuti [1978] KLR 69.** In the circumstances, we would think that the learned Judge was right in striking out the second suit on the ground that it was *res judicata* by reason of O'Connor J.'s decision, against which no appeal was brought and which was in fact in place and had not been impeached.

19. Though we have held that the motion was *res judicata* on the ground that the matter directly and substantially in issue in the suit before Bosire J. was directly and substantially in issue in the earlier suit before O'Connor J. we think we should go further and determine whether such a matter was heard and finally decided in the earlier suit. If this question is answered in the affirmative, ***Section 7*** of the Civil Procedure Act will apply and the later suit before Bosire J. would have been equally barred. The expression "*heard and finally decided"* means a matter on which the court had exercised its judicial mind and has after argument and consideration come to a decision on a contested matter. It is essential that it should have been heard and finally decided. What operates as *res judicata* is the product of what is fundamental to the decision – see **Salem A. Zaidi v Faud Humeidan [1960] EA 92** and **Mulla**: **The Code of Civil Procedure 16 Edn vol.1 page 279**.

20. ***Order VI rule 13*** mandates the court to strike out any pleading on the grounds set out in sub-section (1) thereof. A decision whether to strike out a suit goes to the merits of the suit. We would also, think that when the court pronounces its judgment or ruling under this rule it must be said to be a judgment or decision on the merits on the material before it and have the same effect as a dismissal upon evidence; and accordingly, the matters in issue in the first suit must be deemed to have been heard and determined. See **Humeidan** (ibid). We hold, therefore, that the striking out of the suit before O'Connor J. operated as *res judicata*.

21. In the result, we dismiss Civil Appeal No. 102 of 1998. We make no order as to costs.

22. On 28th May, 1996 Muga filed a Notice of Motion being Nyeri HCC Misc. Civil Application No. 66 of 1996 under ***Order LIII Rule 3*** of the Civil Procedure Rules and the Law Reform Act seeking: -

"**1) AN ORDER OF CERTIORARI to remove into the High Court and quash the proceedings and the Order of warrant of arrest issued in the Senior Resident Magistrate's court at Nyeri in RMCC NO. 32 of 1971 on 11th April, 1996 against the applicant in execution of an Order of assessment of mesne profits made against the applicant and which Order was set aside on 1st September, 1986.**

2) AN ORDER OF PROHIBITION to prohibit the Senior Resident Magistrate, Nyeri, in the said RMCC NO. 32 of 1971 from further proceeding with the hearing of the said Civil Suit and/or execution of the orders already issued therein."

Osiemo J. dismissed the application on the ground that Nyeri RMCC No. 32 of 1971 having been finalised in 1971 and the appeals therefrom having been dismissed there remained no proceedings capable of being removed by an order of certiorari to the superior court for the purposes of quashing.

Muga in this Court's **Nyeri Civil Appeal No. 267** complains that Osiemo J. erred in law in not granting the application since the order for the warrant of arrest issued in Nyeri RMCC No. 32 of 1971 was issued contrary to all provisions of the law; that it was issued without jurisdiction; that ***Kiunga*** was not entitled to *mesne* profits as he had not filed any suit and/or counterclaim against ***Muga*** and that the sum of Shs.157.064/65 shown as interest on the warrant of arrest dated 11th April, 1996 was erroneous and highly exaggerated and purely meant to vex and harass ***Muga***.

23. In our view, we think that Osiemo J. cannot be faulted at all. The application for an order of certiorari was being sought twenty five years after the suit in Nyeri Resident Magistrate's Court had been disposed of and after all subsequent appeals up to this Court had been exhausted. There were therefore no pending proceedings capable of being quashed. Moreover, time for applying for orders of *certiorari* is of the essence and is limited by *Order LIII Rule 2*. In our view, ***Muga*** was guilty of laches and his application for an order of certiorari was hopelessly belated and was properly refused. In the circumstances **Nyeri Court of Appeal Civil Appeal No. 267 of 1998** is hereby ordered dismissed. We make no order as to costs.

24. On or about 18th September, 1997 and while ***Muga*** was contemplating what next move to make ***Kiunga*** transferred the suit land as a gift to ***Francis Kiragu Muriuki*** and ***Moffat Maina Muchangi*** as joint proprietors in common. The transferees are uncle and nephew respectively to ***Kiunga***. The effect of this transfer was that ***Kiunga*** was handing over for free to his relatives ***Muga's*** house, tea and other developments valued at about Shs.4,700,000/= . It is worthy of note that ***Kiunga*** was already in possession of the ten acres given to him by ***Muga***. This new development prompted ***Muga*** to file on 27th May, 1998 Nairobi HCCC No. 2031 of 1998 seeking, *inter alia*, orders for: -

"**i) An urgent temporary injunction to restrain all the Defendants, their servants, agents and/or employees, from evicting the Plaintiff (and his family) from the suit premises (known as TITLE NO. MWIRUA/MUKURE/23) and further from interfering with the Plaintiff's user (sic) of the suit premises in any manner whatsoever until the hearing and determination of this suit.**

ii) An urgent order (under the inherent) jurisdiction and powers of this Honourable Court) to modify, vary and/ or verify any orders made by the said subordinate court (particularly regarding legality, jurisdiction, and arithmetical accuracy of the mesne profits awarded therein) and in the meanwhile to stay the same until hearing and determination of this suit.

iii) A declaration to the effect that the transfer and the registration of the suit premises in favour of the 2nd and 3rd Defendants is illegal, unlawful and therefore null and void and the Register to be restored to its status quo ante forthwith.

iv) A declaration to the effect that the Plaintiff has acquired title by way of adverse possession over the suit premises and the Register thereof to be rectified accordingly.

iv) General damages for trespass the quantum thereof to be determined by the Court."

25. Simultaneously with the lodging of the plaint in Nairobi H.C.C.C. No. 2031 of 1998, ***Muga*** through his advocates M/S Machira & Co also filed a Chamber Summons under ***Order XXXIX Rules 1, 2*** and *3* of the Civil Procedure Rules for a temporary injunction to restrain ***Kiunga*** and the other two defendants from, firstly, evicting him and his family from the suit land; secondly, from committing him to King'ong'o GK Prison; and thirdly, for the stay of orders made in Nyeri S.R.M.C.C. No. 31 of 1971 pending the hearing and determination of the suit.

26. The application for temporary injunctive relief's was heard *ex parte* on 27th May, 1998 by Githinji, J. (as he then was) who granted all the orders sought by ***Muga***. When the application came up for *inter partes* hearing on 16th July, 1998, Mr. Ngunjiri for ***Kiunga*** and the other two defendants moved the Court to strike out Nairobi H.C.C.C. No. 2031 of 1998 on the now familiar two grounds that the suit was:-

(i) *res judicata*;

and was

(ii) scandalous, frivolous, vexatious and an abuse of process of the court.

The application was fully canvassed before Githinji, J. and in a reserved ruling he dismissed the defendants' application on the ground that the previous suits were between ***Muga*** and ***Kiunga*** and did not concern the other defendants. The learned Judge also thought that the defendants could not evict ***Muga*** and his family without filing a substantive suit. The learned Judge, was further exasperated that ***Muga's*** expansive developments were to go to the defendants for free. He held:

"**It appears to me that new issues have arisen as a result of the transfer and as a result of the orders of eviction and arrest. The land and developments are shown as valued at Shs.4.7 million. Are the new owners to take the plaintiff's tea, house, and other developments free of charge? Can they evict him without filing a suit and getting an order for eviction? Can they enrich themselves from the plaintiff's tea, houses and other developments without fully compensating the plaintiff?**

Lastly, it appears to me that the plaintiff has been actively prosecuting the suit and Civil Appeal No. 102/98 is pending in the Court of Appeal by the doctrine of LIS PENDENCE (sic) enacted in section 52 of the Transfer of Property Act, the suit property cannot be transferred during the pendency of the suit (appeal) except under the authority of the court. The issues as to whether the transfer is legal and whether the new owners have a right to evict the plaintiff without compensating him for all his properties are serious issues."

27. The learned Judge then concluded that new serious issues have been raised and that as the subject matter of the suit involved a substantial agricultural property, "the doors of the court" should not be shut against ***Muga***. He dismissed the defendants' plea for the order of *res judicata.* There is no doubt whatsoever that the learned Judge's holding was full of wisdom of Solomon and was morally justified. The question that arises is: was it legal?

28. Mr Ngunjiri has vigorously attacked it in **Nairobi Civil Appeal No. 256 of 1998**. He has submitted that the learned Judge erred in not appreciating that the addition of new parties to the suit by the respondent did not change the respondent's main cause of action. He further contended that the suit was *res judicata* so far as there were three decisions in favour of ***Kiunga*** by other Judges with equal and similar jurisdictions through whom the other two defendants derived their titles.

29. In our view, whether one litigant is bound because he claims under another is a question of substantive law. It is common ground that the suit land, the subject matter of the suit in Nairobi H.C.C.C. No. 2031 of 1998, is one and the same suit land as in the previous suits and was a matter directly and substantially in issue in the suit between ***Muga*** and ***Kiunga.*** However, ***Muga*** in the later suit cannot get back title to the suit land or compensation for his developments which have been assigned to the co-defendants, the 2nd and 3rd respondents herein, and were not a matter directly and substantially in issue in the previous suits without bringing into the later suit ***Kiunga's*** co-defendants. Thus, for ***Muga's*** later suit to be properly adjudicated upon the assignees of his developments are necessary and proper parties to the later suit and *res judicata* in the circumstances does not apply.

30. Again, ***Muga*** avers that ***Kiunga's*** co-defendants obtained the suit land through fraud or collusion. Fraud is, in our view, an extrinsic collateral act which vitiates any solemn proceedings of court of justice and the defence of *res judicata* cannot be allowed to be pleaded so as to entitle a litigant to say that the matter is *res judicata* and cannot be re-opened.

31. We agree with the submission that the transfer of the suit land and ***Muga's*** developments thereon to ***Kiunga's*** relatives for free and as a gift smacks of fraud and collusion and the plea of the doctrine of *res judicata* to forestall the sustenance of the suit is rejected.

32. For the foregoing reasons, Court of Appeal **Nairobi Civil Appeal No. 256 of 1998** is hereby also dismissed but with no order as to costs.

33. It is obvious from these appeals that both parties have abused the process of the court by filing incessant, numerous, unwarranted and somewhat confusing applications and suits. This has gone on for over a period of 35 years or so. The result has been confusion and lack of focus on the matters in issue and that is why we thought of the case of ***Jarndyce and Jarndyce*** (ibid). We deprecate this practice.

34. In summary, therefore our orders shall be as follows:-

(i) **Civil Appeal No. 102 of 1998 is hereby ordered dismissed with no order as to costs.**

(ii) **Civil appeal No. 267 of 1998 is hereby ordered dismissed with no order as to costs.**

(iii) **Civil appeal No. 256 of 1998 is hereby ordered dismissed with no order as to costs.**

(iv) **Nairobi H.C.C.C. No. 2031 of 1998 shall be set down for hearing and the Interim Orders given on 27th May, 1998 by Githinji, J (as he then was) shall be extended until the hearing and determination of the suit.**

(v) **For avoidance of doubt:**

(a) The defendants/appellants their servants, agents and/or employees are restrained from evicting the plaintiff/respondent and his family from the suit land Mwerua/Mukure/23 until the hearing and determination of the suit.

(vi) **All orders made in Nyeri SRMCC No. 31 of 1971 are stayed pending the hearing and determination of the suit Nairobi H.C.C.C. No. 2031 of 1998.**

(vii) **The officer Commanding King'ongo' GK Prison (Nyeri) shall release the plaintiff/respondent forthwith and shall return the said warrants to Court forthwith unexecuted.**

These shall be our orders.

Dated and delivered at Nairobi this 9th day of November, 2007

P.K. TUNOI

…….**……**

JUDGE OF APPEAL

E.O. O'KUBASU

…….**…….**

JUDGE OF APPEAL

W.S. DEVERELL

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR