



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI**

**CIVIL APPEAL NO. 160 OF 1997
BETWEEN
GREENFIELD INVESTMENTS LIMITED.....APPELLANT
AND
BABER ALIBHAI MAWJI.....RESPONDENT**

**(Being an appeal from the Ruling of the High Court of
Kenya at Nairobi (Pall, J.A.) dated 12th March, 1997**

in

H.C.C.C. NO. 3655 OF 1995 (O.S.)

JUDGMENT OF GICHERU, J.A.

Section 7 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya is in the following terms:

"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."

Dealing with the aspect of *res ju dicata* wherein it becomes an abuse of the process to raise in subsequent proceedings matters which could and therefore should have been raised in earlier proceedings, Wigram, V. - C. in *Henderson v. Henderson*, (1843) 3 Hare 100, 115 had this to say:

"...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 matter 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 a 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."

The phrase "every point which properly belonged to the subject of litigation" quoted in the passage set out above was expanded in *Greenhalgh v. Mallard*, [1947] 2 All E.R. 255, 257, by Somervell, L.J. in these terms:

"... *res judicata* for this purpose is not confined to the issues which the court is actually asked to

decide, but... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

" and in *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. and Another*, [1975] A.C. 581, 590E, it was observed that:

'The shutting out of a "subject of litigation" - a power which no court should exercise but after a scrupulous examination of all the circumstances - is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless "special circumstances" are reserved in case justice should be found to require the non-application of the rule.'

By an Originating Summons taken out under **Order XXXVI rule 3D of the Civil Procedure Rules** dated and filed in the superior court on 15th December, 1995, the respondent herein sought orders that he be declared to have become entitled by adverse possession of over 12 years to the piece or parcel of land registered under **the Government Lands Act**, Chapter 280 of the Laws of Kenya and comprised in L.R. NO. 214/273 (Original Number 214/42/1/2) situate in the City of Nairobi in the Nairobi Area, hereinafter called the suit property, and that he be registered as the sole proprietor of the said piece or parcel of land. He also prayed that costs of his Originating Summons be provided for.

On 21st December, 1995 the appellant herein entered appearance to the respondent's Originating Summons and on 9th February, 1996 the respondent under a certificate of urgency took out and filed a Chamber Summons in the superior court in which he sought an interlocutory injunction restraining the appellant, its agents, servants or employees from in any way interfering with his quiet possession and enjoyment of the suit property pending the hearing and determination of his Originating Summons against the appellant. The appellant filed its grounds of opposition to the respondent's Chamber Summons on 13th February, 1996. These grounds were that the respondent's Chamber Summons and Originating Summons were an abuse of the process of the court and that both should be struck out with costs; that the respondent's Originating Summons did not disclose any cause of action; that it was *res judicata*; and that there was in existence a suit dealing with the same issues as those raised in the respondent's Originating Summons. Simultaneously with the filing of its grounds of opposition set out above, the appellant filed a Notice of Motion in the superior court under **sections 3A, 6 and 7 of the Civil Procedure Act and Order VI rule 13(1)(a) and (d) of the Civil Procedure Rules** for orders that the respondent's Originating Summons be stayed as the respondent had lodged a Notice of Appeal and had also filed an application for review of the decision in **High Court Civil Suit NO. 2849 of 1995** which latter was pending in the superior court; that the respondent's Originating Summons did not disclose any reasonable cause of action and the same should be struck out with costs; and that both the respondent's Chamber Summons and the Originating Summons were *res judicata* and were otherwise an abuse of the process of the court and both should be struck out with costs. The grounds upon which this Notice of Motion was founded were that the respondent had filed in the superior court **High Court Civil Case NO. 2763 of 1982** on 3rd September, 1982 claiming that the appellant held the suit property in trust for him; that that suit was dismissed with costs on 6th June, 1988; that an application for extension of time within which to file a memorandum and record of appeal was dismissed by this Court on 11th August, 1995; and that a subsequent **High Court Civil Suit NO. 2 849 of 1995** in which the respondent inter alia claimed damages for trespass to the suit property and pleaded that the appellant held the title to the said property for his benefit was on 24th January, 1996 dismissed on a preliminary objection that the same was *res judicata* and was otherwise caught by the statute of limitation.

From what I have attempted to outline above, it is clear that as on 13th February, 1996 there were two interlocutory applications in the respondent's **High Court Civil Suit NO. 3655 of 1995 (O.S.)**, the first of which was the respondent's Chamber Summons dated and filed in the superior court under a certificate of urgency on 9th February, 1996 and the second of which was the appellant's Notice of Motion dated and filed in the same court on 13th February, 1996. The record of the proceedings in the superior court indicates that on 6th May, 1996, Mr. Gautama appeared for the respondent herein and Mr. Oraro appeared for the appellant herein. There is then an order of that court which is recorded as follows:

"Order: By consent S.O. to 23rd May, 1996 at 11.30 a.m. on Mr. Oraro's preliminary objection."

The appearances were the same on 23rd May, 1996 when Mr. Oraro started to argue the appellant's Notice of Motion. Further hearing of that Motion was stood over to 6th June, 1996 at 2.30 p.m. when Mr. Oraro completed his submissions. Mr. Gautama for the respondent herein then began to respond to the appellant's Notice of Motion. It was then adjourned to 14th June, 1996 at 11.30 a.m. for further hearing when Mr. Gautama continued with his submissions. Subsequently, this Motion was stood over to 29th July and 7th October, 1996 when by a consent order of the superior court Mr. Gautama was to complete his response to the appellant's Notice of Motion by filing written submissions by 31st October, 1996. Mr. Oraro for the appellant having already made his submissions in support of the appellant's Notice of Motion was to make a written reply to Mr. Gautama's submissions by 9th November, 1996. Eventually, a ruling was given on 12th March, 1997. I

in his ruling, Pall, J.A. who had then been elevated to the rank of a Judge of Appeal, after making some preliminary remarks made his position clear by saying as follows:

"I will dispose of the-----Chamber Summons together with the - -----notice of motion. They are both intertwined."

The learned judge then proceeded to hold that for the respondent to have succeeded in the **High Court Civil Case NO. 2763 of 1982**, he had to prove his right to the ownership of the suit property by virtue of an express trust which had been denied by the appellant. In the **High Court Civil suit NO. 2849 of 1995**, the respondent had *inter alia* to prove that he was occupying the suit property as a beneficial owner and had therefore suffered loss and damage by the appellant's trespass onto the said property. According to the learned judge, however, in the respondent's Originating Summons, all he was required to prove was that he had been in possession of the suit property for a continuous period of at least 12 years and that that possession was open and hostile to the appellant. The learned judge was therefore of the view that the respondent's Originating Summons showed a valid cause of action which was not directly and substantially in issue in either of the respondent's two earlier suits referred to in this judgment. Accordingly, the learned judge held that the respondent's **High Court Civil Suit NO. 3655 of 1995 (O.S.)** - the Originating Summons - disclosed a distinct cause of action. The learned judge also held that as the issue of adverse possession raised in the respondent's Originating Summons was not an issue in either of his two earlier suits, the said Originating Summons could not have been *res judicata* nor was his Chamber Summons for an interlocutory injunction. Dismissing the appellant's Notice of Motion in its entirety with costs, the learned judge then proceeded to hold that the respondent had an arguable case against the appellant and that there were serious issues involved in the litigation between the two parties which could only be resolved through a trial in the normal manner. Apparently on that account, the learned judge granted the respondent the interlocutory injunction he had sought in his Chamber Summons dated and filed in the superior court on 9th February, 1996 with costs of the said Chamber Summons abiding the final result of the respondent's Originating Summons.

Vexed by the order arising from the decision of the learned judge as is outlined above, the appellant now appeals to this Court and has put forward eleven grounds of appeal wherein the principal complaints are firstly, that in holding that the respondent could maintain a claim to the suit property by adverse possession despite his having prosecuted his two earlier claims to the said property in **High Court Civil Cases Nos. 2763 of 1982 and 2849 of 1995** by virtue of an express trust, the learned judge was in error. Secondly, in failing to hold that the respondent's claim to the suit property by adverse possession was, in view of his claims to the same property in his two earlier suits above mentioned, *res judicata* and therefore an abuse of the process of the court, the learned judge was also in error. Thirdly, in granting the interlocutory injunction sought by the respondent in his Chamber Summons dated and filed in the superior court on 9th February, 1996 without the same having been canvassed with the appellant being given an opportunity to be heard, the learned judge was clearly wrong.

At the hearing of this appeal on 21st October, 1999, 15th and 16th February, 2000, Mr. Oraro who appeared with Mr. Nyaoga for the appellant submitted that the respondent having claimed the suit property in his two earlier suits - **High Court Civil Cases NOS. 2763 of 1982 and 2849 of 1995** - as a

beneficial owner and having deponed in paragraph 8 of the supporting affidavit to his Originating Summons that his possession to the suit property was always adverse to the appellant's title as he had always contended that the appellant held the said property in trust for him and had at no time paid any rent to the appellant as a tenant, then, adverse possession of the suit property was not available to him. At the outset therefore, the respondent's Originating Summons was a nullity since as a beneficial owner of the suit property he could not in terms of **section 20(1)(b) of the Limitations Actions Act**, Chapter 22 of the Laws of Kenya be in adverse possession of the said property which he claimed to have been held by the appellant in trust for him. In any event, according to Mr. Oraro, as the nature of the respondent's occupation of the suit property never changed either in his two earlier suits referred to above or in his Originating Summons which two earlier suits had determined the nature of his occupation to the suit property, his subsequent claim of the said property by adverse possession in his Originating Summons was **res judicata**. The said summons therefore disclosed no cause of action and amounted to an abuse of the process of the court. Mr. Oraro then concluded his submissions by pointing out that it was not open to the learned judge to determine the respondent's Chamber Summons wherein the respondent had sought interlocutory orders when the same had neither been discussed nor had the appellant been accorded the opportunity to be heard in connection therewith.

Accordingly, if the appellant's appeal to have the respondent's Originating Summons struck out for not disclosing any cause of action did not succeed, then and in the alternative, the interlocutory injunction granted by the learned judge should be set aside and the respondent's Chamber Summons wherein this relief was sought be set down for hearing **inter partes**.

The submissions of Mr. Gautama for the respondent was that the respondent's **High Court Civil Case NO. 2763 of 1982** related to the respondent's claim of ownership to the suit property from the appellant as a beneficiary while the issue in his High Court Civil Suit NO. 2849 of 1995 related to rent and distraint of his goods on the suit property by the appellant in respect of which he claimed general damages from the appellant for trespass. The respondent's High Court Civil Suit NO. 3655 of 1995 (O.S.) related to his entitlement to the suit property by adverse possession. According to Mr. Gautama, the relief sought in this latter suit was distinctly different from the reliefs sought in the respondent's two earlier suits referred to above. The issue of *res judicata* in regard to the respondent's Originating Summons, did not therefore arise. The latter disclosed a cause of action and was therefore not an abuse of the process of the court. Regarding the appellant's complaint that the grant to the respondent of an interlocutory injunction was without the appellant being afforded an opportunity to be heard in connection therewith and indeed, that the respondent's Chamber Summons in that respect was never discussed, Mr. Gautama's submission was that from the record of the proceedings in the superior court, everything about the respondent's application for an interlocutory injunction was said. Hence, the appellant's complaint in this regard should be ignored and in any case, the appellant's application to have the ruling of the learned judge reviewed on this aspect was rejected on 25th of April, 1997 and the appellant has not appealed against that rejection, Mr. Gautama concluded.

Although the suit property is the subject-matter in all the three suits filed by the respondent as are referred to in this judgment, and as is indicated at the beginning of this judgment, every point which properly belonged to the suit property which latter was the subject of litigation in those suits should with the exercise of reasonable diligence have been brought forward in the said suits for the superior court to form an opinion and pronounce judgment on them if need be, it does not seem to me that the respondent's claim of ownership to the suit property by adverse possession could have been brought into either of the respondent's two earlier suits, namely; **High Court Civil Cases NOs. 2763 of 1982 and 2849 of 1995**, for the superior court to form an opinion and pronounce judgment on it. This therefore was not a matter that could have been litigated in the proceedings in the two civil suits referred to above. Its being litigated in the respondent's Originating Summons was not caught up by the doctrine of **res judicata** and was not an abuse of the process of the court. However, regarding the grant to the respondent of the interlocutory injunction sought by him in his Chamber Summons dated and filed in the superior court on 9th February, 1996, it is clearly obvious that this Chamber Summons was never urged before the learned judge. The appellant's complaint therefore that the determination of this Chamber Summons was without its (appellant) being given an opportunity to be heard is not without a sound foundation. Whereas I can find no merit in the appellant's appeal in regard to the respondent's Originating Summons taken out and filed

in the superior court on 15th December, 1995 being res judicata and therefore an abuse of the process of the court, and on this aspect of the appeal I would dismiss the same, there is merit in the appellant's appeal concerning the granting of an interlocutory injunction to the respondent without the Chamber Summons in respect thereof being discussed before the learned judge and without the appellant being given an opportunity to be heard. Whether or not a subsequent application by the appellant for the review of the decision of the learned judge in this regard was rejected and no appeal was preferred is, in my view, irrelevant to the appellant's present appeal. To the extent that this latter complaint is concerned, I would allow the appellant's appeal, set aside the interlocutory injunction granted to the respondent by the superior court and order that the Chamber Summons in connection therewith be set down for hearing *inter partes*. As the appellant has partly been unsuccessful and partly successful in this appeal, I would make no order as to the costs occasioned by the appeal. Akiwumi and Owuor JJ.A. agree, and it is so ordered.

Dated and delivered at Nairobi this 31st day of March, 2000.

J.E. GICHERU

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JUDGE OF APPEAL