



REPUBLIC OF KENYA



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**Mukhamari v Wekesa (Environment and Land Appeal E014 of 2021)
[2023] KEELC 358 (KLR) (24 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 358 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E014 OF 2021**

BN OLAO, J

JANUARY 24, 2023

BETWEEN

MOSES WAMALWA MUKHAMARI APPELLANT

AND

JOHN MUTALI WEKESA RESPONDENT

*((an appeal from the judgement of Hon. M. Munyekenye SPM delivered
on 7th July 2021 in Webuye Spm Court Elc Case No 8 of 2019))*

JUDGMENT

1. Moses Wamalwa Mukhamari (the Appellant) approached the subordinate Court at Webuye via ELC Case No 8 of 2018 where he sought against John Mutali Wekesa (the Respondent herein) the following orders:
 1. An order for the cancellation of the name of the Respondent from the register to the land parcel No Ndivisi/ndivisi/1699.
 2. Payment of mesne profits form November 16, 2008 until such time as the Respondent surrenders the land.
 3. Costs
 4. Interest
 5. Any other relief that this Honourable Court deems fit and just to grant.
2. The Appellant was and is still acting in person and as is common in such cases, it is usually very difficult to comprehend pleadings drawn by pro se litigants. Doing the best I can, what I can decipher from paragraph 3 of the plaint is that the Appellant concedes that the Respondent is the registered proprietor of the land parcel No Ndivisi/Ndivisi/1699 measuring 0.4 Hectares (the suit land) which



was the subject of a previous litigation being Bungoma CMCC Civil Case No 602 of 2002 wherein the Appellant was ordered to refund the purchase price thereby extinguishing the Respondent's right in the suit land. However, the Respondent has continued to cling onto the suit land thus necessitating the filing of the suit in the Webuye Court.

3. The Respondent filed a defence in which he pleaded inter alia, that the suit was res-judicata Bungoma CMCC NO 602 of 2002 which was heard and determined and the suit was therefore misconceived, frivolous, vexatious and an abuse of the process of the Court which should be dismissed with costs.
4. The dispute was heard by Hon M Munyekenye SPM on March 24, 2021 and the parties were the only witnesses who testified and adopted their respective statements as their evidence.
5. The trial magistrate delivered a brief judgment on July 7, 2021 dismissing the Appellant's case with costs.
6. Aggrieved by that judgment and still acting in person, the Appellant filed this appeal on July 26, 2021 seeking to have it set aside.
7. The following nine (9) grounds of appeal were proffered:
 1. The Learned Magistrate erred in law and in fact in taking evidence in isolation and issuing biased orders against the Appellant in a matter that was properly before the court in that she found in favour of the Respondent who had not proved his case against the Appellant.
 2. That the Learned Magistrate erred in law and fact by not considering the water tight evidence as adduced by the Appellant as opposed by the Respondent and got biased in finding in favour of the Respondent.
 3. That the Learned Magistrate erred in law and fact by treating admissible contradicting evidence of the Respondent as opposed to the corroborated Appellant's evidence herein and finding in his favour and thereby miscarrying (sic) ends of justice.
 4. That the Learned Magistrate erred both in law and fact in confirming the evidence of the Respondent herein alleging that the Appellant's case was res judicata without any proof thereon and thus visited injustice upon the Appellant.
 5. That the Learned Magistrate erred both in law and in fact in failing to find that the Appellant had a prima facie case that succeeded on a balance of probability but dismissed it.
 6. That the Learned Magistrate erred both in law and in fact in failing to find that the Respondent's defence which was full of admissions without legal basis in law given the nature of the pleadings and evidence on record.
 7. That the Learned Magistrate erred both in law and fact thus in that in her ruling she relied on unlawful inadmissible evidence and has thus occasioned great loss and injustice to the Appellant.
 8. That the said judgment and ruling rendered by the Learned Magistrate herein was against the weighty evidence adduced by the Appellant.
 9. That finally, the Learned Magistrate erred in law and was therefore biased in using technicalities in law in contravention of the Constitution 2010 and thereby denying the Appellant his fundamental rights and privileges.



8. The appeal has been canvassed by way of written submissions filed both by the Appellant in person and by Mr Murunga instructed by the firm of JO Makali & Company Advocates for the Appellant.
9. I have considered the record herein and the submissions filed.
10. This being a first appeal, this court is entitled to re-consider the evidence, evaluate it and make its own conclusions. An appellate court will not ordinarily interfere with the findings of fact by the trial court unless they were based on no evidence at all or were arrived at on a misapprehension of the evidence and the law – *Mwanasokoni v Kenya Bus Service Ltd 1982-88 1 KAR 278*. I must also take into account the fact that I neither saw nor heard the witness and should therefore make due allowance in that respect – *Selle & Another v Associated Motor Boat Co & Another 1968 EA 123*.
11. As I stated at the commencement of this judgment, the Appellant is a pro se litigant and that must be now clearly evident from his memorandum of appeal. Nonetheless, it is the duty and responsibility of this Court to do the best it can and serve justice to the parties based on their pleadings.
12. I will start with ground No 4 in which the Appellant faults the trial magistrate for alleging that his case was res judicata. I have looked at the impugned judgment and other than referring to the Respondent's defence that the Appellant's suit was res judicata since it touched on the same issue and involved the same parties as in Bungoma CMCC NO 602 of 2002 and although the plea of res judicata was raised when Mr Makali Counsel for the Respondent cross-examined the Appellant, the trial magistrate made no findings on it. The record shows that the parties litigated over the suit land in Bungoma CMCC NO 602 of 2002 where the Respondent herein was the plaintiff while the Appellant herein was the defendant. The Respondent was seeking an order for specific performance of an agreement for the purchase of the suit land or in the alternative, the refund of the purchase price. In a judgment delivered on December 16, 2008, Hon R Nyakundi (now Judge) entered judgment in favour of the Respondent for a refund of the purchase price of Kshs 70,000. It would appear from the rather convoluted pleadings of the Appellant in his amended plaint that the suit in the subordinate court sought to have the Respondent's title to the suit land cancelled for failure to refund the purchase price. I say so because of the pleadings in paragraphs 3, 4, 6, 7 and 8 of the Appellant's amended plaint where he has stated:

' 3. That at all material times to this suit, the defendant is the absolute registered owner of all that parcel of land known as Ndivisi/Ndivisi/1699 measuring 0.4 Hectares.'

4. 'That the plaintiff avers that that the said land which was registered initially in his names was transferred to the defendant on account of a sale agreement for a total consideration of a sum of Kshs 70,000.'

6. 'That the plaintiff further avers that the defendant thereafter was not satisfied with the suit portion herein and sued the plaintiff for specific performance instead to acquire the alternative portion comprised in title No Ndivisi/Ndivisi/1751 in Bungoma Chief Magistrate's Court in Civil Case No 602 of 2002. Better and further particulars are well within the defendant's knowledge.'

7. 'That the plaintiff avers that the said case was determined and that the plaintiff was advised to refund the purchase price plus costs of the said suit and interests prayers of specific performance were ordered. Better and further particulars are well written in the defendant's knowledge.'

8. 'That it is the plaintiff's case that since the following decisions which were made on the November 16, 2008 the defendant's right of interest in title No Ndivisi/ndivisi/1699 ceased forthwith.'



It appears to this Court that what the Appellant was seeking by his amended plaint was to enforce the decree issued in Bungoma CMCC NO 602 of 2002 by cancelling the Respondent's title to the suit land because he (Appellant) fully refunded the purchase price. If that is his case, all the issues arising out of the judgment in Bungoma CMCC NO 602 of 2002 could only be pursued in that case and not by filing another case. Section 34 of the [Civil Procedure Act](#) is instructive. It reads:

34. 'All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.'

The Respondent's defence was that in fact the Appellant only refunded a sum of Kshs 40,000 leaving the principal, costs and interest still accruing. Whatever the case, those issues could only be canvassed in Bungoma CMCC NO 602 of 2002 or on appeal. The suit in the subordinate court was, as correctly pleaded by the Respondent in paragraph 6 of his defence, misconceived, frivolous, vexatious and an abuse of the process of the court. It was for striking out. This is a matter of law which can be raised for the first time on appeal even suo motto as it touches on the jurisdiction of the trial court – [Lemita Ole Lemoin v A-g & Others 2020 eKLR](#). See also [Kenya Commercial Bank v Osebe 1982 KLR 296](#) where it was held that although an appeal must be confined to the points of law raised and determined by the trial court, there are two exceptions to that rule namely where the trial court commits an illegality or acts without jurisdiction. If the trial magistrate in this case had considered the provisions of Section 34 of the [Civil Procedure Act](#), she would have come to the inevitable conclusion that the remedies which the Appellant was seeking were the preserve of the dispute in Bungoma CMCC NO 602 of 2002 and could not be canvassed in the dispute before her. This issue of this suit being res judicata was pleaded and raised during the trial. When he was cross-examined by MR. Makali Counsel for the Respondent, the Appellant is recorded as stating that:

' I admit that the Bungoma CC NO 602 of 2002 was between the defendant and myself. It was touching on the subject matter Ndivisi/Ndivisi/1699. The case was heard and determined.'

Res judicata is provided for in Section 7 of the [Civil Procedure Act](#) as follows:

7. '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.'

Res judicata is therefore a complete bar to any subsequent proceedings involving the same parties or those acting through them over an issue that has previously been heard and determined in a previous suit. See [Kamunye & Others v Pioneer General Assurance Society Ltd 1971 EA 263](#). In [John Florence Maritime Services Ltd & Another v Cabinet Secretary For Transport And Infrastructure & Others CA Civil Appeal No 42 of 2014 \[2015 eKLR\]](#), the Court of Appeal identified its rationale as follows:

' The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of Court's limited resources and



timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts.'

Ideally, the Respondent having pleaded in paragraph 4 of his defence that his suit was res judicata and that he would apply to have it struck out, his counsel ought to have raised that issue as a preliminary objection. Further, nothing stopped the trial magistrate from prodding the parties to canvas the issue as a first point of call became, as held in the case of John Florence Maritime Services (supra) that would 'ensue the economic use of court's limited resources and timely termination of cases.' If the plea of res judicata had been raised early in the trial and up-held, as it no doubt would have been in the light of the evidence before the trial court, there would have been no need to pit the parties and their counsel through the plenary hearing.

13. However, although that was not done, the pleadings and judgment in Bungoma CMCC NO 602 of 2002 were part of the documentary evidence placed before the trial magistrate and from the Appellant's own testimony which I have referred to above, he admitted that the dispute over the suit land had been heard and previously determined by another competent court. And although the trial magistrate did not specifically determine the case before her on that basis, it is clear that the suit before her was clearly res judicata. Ground 4 of the memorandum of appeal in which the trial magistrate is faulted for having erred both in law and in fact by alleging that the Appellant's case was res judicata must be dismissed. The Appellant's suit was clearly barred by the doctrine of res judicata.
14. The remaining grounds of appeal can be considered together. They basically take issue with the trial magistrate for failing to find in favour of the Appellant in spite of him having adduced sufficient evidence and thus occasioning a miscarriage of justice. Nothing can be further from the truth. The Appellant sought the main remedy that the Respondent's title to the suit land be cancelled and that he be paid mesne profits. Since the Respondent is the registered proprietor of the suit land, his title thereto could only be cancelled if, as is provided under Section 26(1) of the *Land Registration Act*, the Appellant had proved that the said title had been procured through fraud, misrepresentation, illegally, unprocedurally or through a corrupt scheme. The Appellant neither pleaded nor led evidence to suggest that the Respondent's title to the suit land was obtained in the manner provided for under the above provision of the law. And with regard to the claim for mesne profits, those are a special damage claim which needed to have been specifically pleaded and pointed – see *Peter Mwangi Mbutia & Another v Samon Edin Osman 2014 eKLR* where the Court of Appeal stated that it is upon a party to place evidence before the Court upon which an order of mesne profits could be made. Other than pleading in paragraph 10 of his plaint that the court should award him mesne profits from November 16, 2008, the Appellant did not plead any sum or lead any evidence to enable the trial magistrate award such damages.
15. Finally, in the course of cross-examination by Mr Makali, the Appellant said:

' I abandon the prayer for cancellation of the title. I make prayer that the court transfer the land to me.'

Having abandoned the prayer for the cancellation of the Respondent's title to the suit land, and which was really the plank of his case before the trial magistrate, that case immediately crumbled and collapsed. There was nothing left upon which the trial magistrate could have



made any other orders in his favour. That explains why the trial magistrate was short and thrift in her judgment which, having analysed all the evidence before her, this court must up-hold.

16. The up-shot of all the above is that this appeal is devoid of any merit. It is accordingly dismissed with costs.

BOAZ N. OLAO

JUDGE

24THJANUARY 2023

Judgment dated, signed and delivered at BUSIA ELC on this 24th Day of January 2023 by way of electronic mail with notice to the parties. Right of Appeal.

BOAZ N. OLAO

JUDGE

24THJANUARY 2023

