Nabui v Wanyama & others (Civil Appeal E024 of 2023)
[2025] KEHC 9080 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9080 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E024 OF 2023

MS SHARIFF, J

JUNE 26, 2025

BETWEEN

FRANCIS NYONGESA NABUI ..... APPELLANT

AND

PETER WANYAMA & OTHERS ..... RESPONDENT

(An appeal from the ruling of the Chief Magistrate's Court at Bungoma by Hon. C.A.S Mutai-SPM delivered on 8th September 2002 in CMCC No. 67 of 2020-formerly HCCC No. 142 of 1994)

JUDGMENT

Background

1. This appeal emanates from a ruling by Hon. C.A.S Mutai-SPM delivered on 8th September 2002, wherein the appellant's suit was struck out with costs for want of prosecution.

2. The Appellant commenced a suit in the High Court vide a Plaint which was filed on 28th January 1995. He averred that on or about 22nd January 1990, the Defendants (Respondents herein) unlawfully trespassed, converted and disposed off the Appellant's property at a throw away price to third parties without his approval and consent. As a result of the said actions, the Appellant suffered loss of use of his motor vehicle, loss of income from the careless usage of his iron sheets and oxen plough due to the wrongful acts of the Respondents. He averred that the Respondents owed him a fiduciary duty to keep and preserve his property but they abused that same duty of care by selling his goods and chattels fraudulently resulting in his incurring loss.

3. This suit was later transferred to the subordinate court and assigned a new case number being Bungoma CMCC No 67 of 2020. Despite the suit being set down for hearing on several instances, it did not proceed for a number of reasons. On 3rd May 2004, the Deputy Registrar High Court issued a Notice for dismissal of the suit under the Civil Procedure Rules notifying the Appellant that his matter shall be placed before the sitting judge on 10th May 2004 for dismissal unless sufficient cause is shown as to

why such an order ought not be made. It is evident from the Affidavit of Service dated 10th May 2004, that an appointed Court Process Server had on 6th May 2004, served the show cause notice upon the appellant's then Advocates. On 10th May 2024 when the matter came up for showing cause as to why it ought not be dismissed before Justice J.K. Sergon, there was no appearance from the Appellant and the suit was dismissed for want of prosecution.

4. On 25th November 2004, the Respondents counsel filed the Defendants Bill of Costs and the same was taxed on 21st January 2005 at Kshs. 58, 100/= and a Certificate of Costs issued accordingly. Counsel for the Respondent proceeded to apply for the extraction of decree for purposes of execution. The notice to show cause why execution should not issue was served upon the Appellant herein as per the Affidavit sworn on 23rd August 2005, by Isaac Bufu Mayeku, a licensed Court process server. The decree for money was duly extracted and warrants of sale of property in execution of decree for money were issued to Kuronya Auctioneers, Bungoma.

5. Vide a letter from the Appellant to the Executive Officer, Bungoma Law Courts, received on 5th September 2005, the Appellant herein requested for typed and certified copies of the proceedings and judgement. On 28th September 2005, he filed in Court a Motion application dated 28th September 2005, by the law firm of Onyikwa & Co. Advocates seeking stay of execution for costs pending hearing and determination of the application inter partes and that the ex-partes orders issued on 10th May 2004 dismissing his suit for want of prosecution and all consequential orders be set aside. The Court on 29th September 2005 issued the orders of stay of execution for costs pending hearing and determination of his application. On 19th October 2005, before Justice J.K. Sergon the parties recorded a consent that the Motion application dated 28th September 2005 be allowed with no order as to costs.

6. On 13th February 2020, the Court elaborated to the Appellant that his claim was for Kshs. 800,000/= and such a claim can be handled by a Magistrate's Court. Justice S.N. Riechi proceeded to transfer the matter to the Chief Magistrate's Court at Bungoma for hearing.

7. On 27th February 2020, when the matter came up for directions, the Appellant brought it to the attention of the Court that the file had been misplaced and he prayed for a mention date and vide a letter filed on 6th February 2020, they Appellant request the Executive Officer, Bungoma Law Court to have the file BGM HCCC No. 142 of 1994 located for purposes of having the case proceed.

8. On 12th March 2020, the matter was placed before Hon. C.A.S Mutai- SPM wherein the Appellant prayed for a hearing date and the Court issued directions that the same be listed on 30th July 2020, and the Appellant agreed with the Court. On 30th July 2020, Mr. Wamalwa Simuyu appearing for the Appellant requested for more time to familiarize himself with the file having been recently instructed. The Court gave a hearing date of 14th October 2020. On 14th October 2020, the Appellant was appearing himself and the Respondents counsel requested time to have parties comply with the filed Preliminary Objection. The Court issued a mention date of 10th November 2020. On 28th January 2021, with no appearance from the Respondents counsel the matter was listed for mention on 8th April 202. On 22nd April 2022, there was still no appearance from the Respondents counsel and the firm of M/S Kituyi Advocates was on record for the Appellant. The Court proceeded to list an application dated 30th March 2021, for hearing on 3rd June 2021. The motion application by the Respondents sought orders that: the Honourable Court be pleased to strike out the suit for being bad in law and res judicata and that the Honourable Court do strike out the suit for having abated by operation of law and for being scandalous, vexatious and an abuse of the due process. The motion was based on the grounds that the suit was dismissed way back in 2005 and the same is res judicata as no application was ever made to revive or reinstate the same. Further that the 2nd, 3rd, 4th and 7th Defendants had since passed on hence the claim had been abated and the suit cannot survive against the remaining defendants, and

that the said suit was bad in law, defective ad should be struck out as the Plaintiff failed to comply with Order11 of the Civil Procedure Rules.

9. Om 3rd June 2021, the application dated 30th March 2021 was fixed for hearing on 8th July 2021 but the court did not sit in that date and the application the rescheduled to 2nd September 2021. On that date the Plaintiff acting in person was not present in Court, thus the Court issued a fresh hearing date for 28th October 2021. On 28th October 2021, both parties were present, but the Respondents counsel brought it to the attention of the Court that he was not able to serve the application dated 30th March 2021, upon the Plaintiff and prayed for a fresh hearing date of 13th January 2022. On 13th January 2022, both parties were present in Court for hearing of the application dated 30th March 2021, and counsel for the Respondents was not ready to proceed as he was indisposed and M/S Wahome who was holding brief was not in a position to proceed. By consent hearing of the application was scheduled for 10th March 2022. On 10th March 2022, with both parties present in Court, counsel for the Respondents argued that the application dated 30th March 2021 was never opposed and urged the Court to allow the same and in response the Appellant sought to have the case proceed.

10. On 8th September 2022, the trial Court rendered its ruling on the application dated 30th March 2021, stating that the matter was not prosecuted by the Appellant for a while and the application by the Respondents was not opposed despite issuance of notice. The trial magistrate proceeded to strike out the suit with costs. His ruling was dated 8th April 2022.

11. Aggrieved by the ruling dated 8th April 2022 and erroneously typed as delivered on 8th September 2022, the Appellant herein filed his record of appeal preferring the following summarized grounds:

    a. The trial magistrate erred in law and facts when he failed to hold the suit before Court that notice of dismissal was never served upon the Plaintiff.

    b. The learned trial magistrate erred in law and fact by basing its ruling on the issue of technicalities.

    c. The learned trial magistrate erred in law and fact by failing to take-action despite the Court orders reinstating the suit for trial.

    d. The ruling is against the weight of the evidence and the law.

12. The appeal was canvassed by way of written submissions. Only the Appellant filed his written submissions.

13. It is the duty of this court, as the first appellate Court, to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing its own conclusions from that analysis and bearing in mind that the Court did not have an opportunity to hear the witnesses first hand - see the Court of Appeal case of Gitobu Imanyara & 2 Others –vs- Attorney General [2016] eKLR. The same Court in Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, stated as follows on the issue:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

14. I have gone through and considered the Notice of Motion Application dated 30th March 2021, the lower Court proceedings, Appellant's Written Submissions dated 28th December 2024 and the only issue for determination is if the Appellant appeal is merited.

15. From the record, on 10th May 2004, Justice J.K. Sergon dismissed the Appellant suit for want of prosecution. On 19th October 2005, by consent the Appellant's application dated 28th September 2005 was allowed. The application sought orders that stay of execution for costs pending hearing and determination of the application interpartes and that the ex-partes orders issued on 10th May 2004 dismissing his suit for want of prosecution and all consequential orders be set aside. The matter was later on, 13th February 2020, referred to the Chief Magistrate's Court at Bungoma.

16. It is evident for the record that, the application dated 30th March 2021, sought to have the Appellant's suit strike out for having abated by operation of law and the same being scandalous, vexatious and an abuse of the due process. The motion was based on the grounds that the suit was dismissed way back in 2005 and the same is res judicata as no application was ever made to revive or reinstate the same, that the 2nd, 3rd, 4th and 7th Defendants passed on hence the claim has been abated and the suit cannot survive against the remaining defendants, and that the said suit is bad in law, defective ad should be struck out as the Plaintiff failed to comply with Order11 of the Civil Procedure Rules.

17. It is imperative I note that Section 107(1) of the *Evidence Act* (Chapter 80 of the Laws of Kenya), which provides:

    107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

18. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence (See Isca Adhiambo Okayo v Kenya Women's Finance Trust KSM CA Civil Appeal No. 19 of 2015 [2016] (eKLR). That is captured in Sections 109 and 112 of the Act as follows:

    109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

    112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

19. It has been mentioned by the Respondents counsel that the 2nd, 3rd, 4th and 7th Defendants passed on, but it was incumbent upon the person alleging a fact to tender sufficient evidence into Court and to the Appellant as proof to demonstrate that the 2nd, 3rd, 4th and 7th Defendants were indeed dead. The Court proceedings and record before does not establish that indeed the 2nd, 3rd, 4th and 7th Defendants were dead. In this case we cannot say that the Appellant's claim abated due to the demise of these Respondents. Accordingly, in my view the relevant provision is Order 24 rule 4 of the Civil Procedure Rules which provides that:

    1. Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

2. Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

3. Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.

20. This brings us to what the doctrine of res judicata is all about. Section 7 of the *Civil Procedure Act*, 2010 provides as hereunder:

> " 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."

21. It is now old hat that the said doctrine applies to both suits and applications as was held in Abok James Odera vs. John Patrick Machira Civil Application No. Nai. 49 of 2001. However, as was held in the said suit, to rely on the defence of res judicata there must be:

(i). a previous suit in which the matter was in issue;

(ii). the parties were the same or litigating under the same title;

(iii). a competent court heard the matter in issue;

(iv). the issue had been raised once again in a fresh suit.

22. As regards the rationale of the doctrine of res judicata, reliance was placed on the decision of the Court of Appeal in Independent Electoral & Boundaries Commission –vs- Maina Kiai & 5 Others (2017) eKLR.

> " The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

23. Based on the above it is clear that this case did not fit the bill for application of the doctrine of res judicata as purported in the Respondents grounds in the Notice of Motion application dated 30th March 2021.

24. Since the 8th April 2021, when the Respondents filed their Notice of Motion application dated 30th March 2021, seeking to have the Appellant's suit struck out, the Appellant did not file a Replying Affidavit and/or Grounds of Opposition. This means that the Respondents application was unopposed. That notwithstanding the trial court had a duty to peruse the record for purposes of confirming whether the dismissal orders made by Justice Sergon were still subsisting. The trial court did not do so wherefore it fail to consider material fact relevant to the suit. The trial court thus acted in error.

25. On the balance I do find that this appeal is merited and I allow and I thus make the following orders:-

i. The ruling made by the trial court on 8th April 2022 and erroneously typed in the proceedings as delivered on 8th September 2022 is hereby set aside and the suit in the lower court to be set down for hearing.

ii. This file is hereby marked as closed.

iii. Each party to bear its own cost

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 26TH JUNE 2025.

M.S.SHARIFF

JUDGE

In the presence of:

Appellant

N/A for Respondents

Peter Court Assistant