IN THE COURT OF APPEAL

AT NAKURU

[CORAM: NAMBUYE, SICHALE & KANTAI, JJA]

CIVIL APPEAL NO. 234 OF 2015

BETWEEN

THOMAS K. SAMBU.....APPELLANT

-VERSUS-

PAUL K. CHEPKWONY alias

PAUL CHEPKWONY KOSKEI.....RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya

at Kericho (Hon. Justice Sila Munyao J.) Dated 24th July, 2014,

In

Kericho E.L.C. Case No. 54 of 2014)

****

JUDGMENT OF THE COURT

This is an appeal arising from the Ruling of the High Court, the Hon. Mr. Justice **Sila Munyao**, **J.** in Kericho ELC case Number 54 of 2014, dated the 24th day of July, 2015, dismissing the appellant's suit with costs to the respondent.

The background to the appeal is that, the appellant filed Kericho HCCC No. 23 of 2009 against the respondent, vide a plaint dated the 20th day of February, 2009, and as amended on the 14th day of April, 2009, seeking *inter alia*, a declaration that he was the absolute proprietor of LR. No. Kericho/Ainamoi/409 (the suit property) and an order of eviction against the respondent. The respondent's defence to that claim is not traced on the record. The suit was however, subsequently dismissed on the 29th day of June, 2011, for non-attendance. The appellant filed a Notice of Motion dated the 11th day of July, 2011, premised on order 12 Rule 7 of the Civil Procedure Rules (CPR) (repealed) and section 3 of the Civil Procedure Act (CPA), seeking an order of the Court to review and set aside or vary the orders of the Court made on the 29th day of June, 2011, dismissing his suit for non-attendance. The application was resisted by the respondent's grounds of objection. The application was canvased by way of written submissions. The review Judge **C. M. Waithaka, J,** in a ruling delivered on the 29th day of May, 2014, declined to reinstate the suit.

The appellant filed a Notice of Appeal dated the 10th day of June, 2014, intending to appeal against the whole of the said ruling. Instead of pursuing that appellate process, he moved to the same venue and filed Kericho ELC case **No. 54/2014** basically on the same averments and seeking reliefs as those previously sought in Kericho HCC No. 23 of 2009. The respondent resisted the said suit vide a defence dated the 13th day of January, 2015.

On the 26th May, 2015 when the matter was placed before the trial Judge for directions on the way forward, the Judge *suo moto*, made observations thereon as follows:-

> ***"Court - I can see that there was a previous suit that was dismissed, that is Kericho HCCC No. 23 of 2009. Isn't this case res judicata?. I place the file aside for you to show cause why this case should not be dismissed".***

That issue was canvased by way of written submissions.

After due consideration of the record in the light of the rival submissions made before him by the parties, the Judge made findings thereon *inter alia*, that, ELC 54/2014 was similar in all material particulars to Kericho HCCC NO. 23 of 2009, dismissed on the 29th day of June, 2011, for non-attendance; that the respondent had appeared at the hearing and did not admit any part of the appellant's claim; that the matter was dismissed pursuant to the provisions of order 12 rule 3; that the answer as to whether the appellant was entitled to file a new suit after the dismissal of his suit under order 12 rule 3, CPR lay in order 12 rule 6 of the CPR. After considering order 12 rule 6 (2) the Judge opined as follows:-

> ***"it will be seen that order 12 Rule 6(2) is clear and unambiguous, that where a suit has been dismissed under Rule 3 (meaning order 12 Rule 3) no fresh suit may be brought in respect of the same cause of action. There is no contention that the cause of action in this case is similar to the cause of action in Kericho HCCC NO. 23 OF 2009. It follows that the plaintiff is barred from filing a new suit over the same cause of action"***

The Judge went further and reviewed the rival case law relied upon by the parties in support of their opposing positions, and found those relied upon by the appellant distinguishable; found issues in controversy before him similar to those addressed by the predecessor of the Court in **Salem Ahmed Hasson Zaidi versus Faud Hussein Humeidan [1960] EA** 92, in which the Court held *inter alia,* that, " ***a judgment pronounced against a party under rule 178 of the rules of Court must be deemed to be a decision on the merits and have the same effect as a dismissal upon evidence and accordingly the matter in issue in the factor must be deemed to have been heard and determined; the dismissal of the earlier action therefore operated as res judicata."*** In the Judge's view, Rule **178** was similar to order 12 Rule 3(1) under which Kericho HCCC 23/2009 had been dismissed for non-attendance. On that account, the Judge deemed Kericho HCCC 23 /2009 to have been heard and determined on its merits and the order on dismissal for non-attendance in the Judge's view operated as a final Judgment, in terms of the holding in the **Salems case** (Supra).

On account of the above position, the Judge was of the view that the best cause of action to take by the appellant upon loosing on the application for review and setting aside of the dismissal order for non-attendance was not to file a fresh suit, but to appeal against that order, a process the appellant had in fact initiated but then abandoned. On that account, the Judge dismissed Kericho ELC 54/2013 with costs to the respondent.

The appellant filed this appeal against that dismissal order raising four (4) grounds of appeal. Grounds 1 & 4 were abandoned at the hearing, leaving grounds 2 and 3 to go for trial. It is the appellant's complaint that:-

> *(2)* ***The learned trial Judge of the Superior Court grossly misdirected himself in adopting an interpretation of Order 12 rules 6 of the Civil Procedure rules as the interpretation given thereto distorts the intention of parliament, offends the policy of the law as regards disputes and violates the provisions of the 2010 Kenya Constitution hence lead (sic) to a miscarriage of justice,***
>
> ***(3) The learned trial Judge of the Superior Court misconstrued and disregarded clear provisions of Section 7 of the civil procedure Act Cap 21 as regards the doctrine of*** *res judicata* ***and as a result of which he improperly applied it to the prejudice of the appellant's case.***

The appeal was canvased by way of oral submissions.

It is the appellant's submission that the Judge based his decision on a *res judicata* interpretation of order 12 Rule 6 (2) of the CPR and failed to appreciate the intent and purport of the use of the word "may" in the said provision; that the word "may" in the said provision was permissive and donates a right to a party affected by that provision to file a fresh suit. Further that the Judge's action offended the provision of Article 159(2) (d) of the Kenya Constitution, 2010 on the rule against technicalities, and Article 50 of the same Constitution on the right of a fair hearing.

To buttress the above submissions, the appellant relied on the House of Lords decision in **Birkett versus James [1977] 2 All ER 801,** for the holding *inter alia* that where an action is dismissed for want of prosecution before the limitation period has expired, the defaulting party has a right of starting a fresh action within the limitation period; **Simon Waiti Kimani versus Equity Building Society [2010] eKLR,** and **Wangulu versus Kania [1987] KLR 51,** for the holding *inter alia* that the Court has a discretion to dismiss a matter for non-attendance and to reinstate the same.

Opposing the appeal, the respondent submitted that the trial Judge correctly interpreted and formed the correct impression that order 12 rule (3) as read with order 12 rule 6 (2) is couched in mandatory terms; that the authority of **Birkett versus James** (supra) relied upon by the appellant is distinguishable from the circumstances of this appeal as it dealt with dismissal of a matter for want of prosecution. That the appellant having unsuccessfully sought review and setting aside, lost his right to file a fresh suit as of right. He should have pursued the appellate process which he had initiated but subsequently abandoned. It was also the respondent's submission that although the Judge made a finding that the order on dismissal for non-attendance amounted to a final Judgment, the Judge did not address the issue of *res judicata* in his ruling. Neither did he fault the appellant's subsequent suit on that account as the gist of the Judge's holding in the respondent's view was that the appellant had invoked a wrong process to redress his grievance.

To buttress his submissions, Counsel relied on **Shelf Co. Ltd & another versus Attorney General & Others** [2015] eKLR, for the proposition that Courts of law should be hawk eyed to prevent the readjudication of matters that are already *res judicata.*

In reply to the respondent's submissions, the appellant reiterated that Order 12 rule 6 (2) is not couched in mandatory terms; that the trial Judge fell into error when he interpreted the word "may" to mean "shall".

This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyze the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of **Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2 EA 212** where in the Court held *inter alia*, that:

> ***"in a first appeal from the High Court, the Court of Appeal should re-consider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the Court is to rule on the evidence on the record and not to introduce extraneous matters not dealt with by the parties in the evidence".***

We have considered the record in the light of the rival submissions and the principles of law relied upon by the parties in support of their opposing positions. In our view, the issue that falls for our determination is only one, namely, whether the dismissal of Kericho HCCC No. 23 of 2009 for non-attendance amounted to a final Judgment of the Court.

The doctrine of *res judicata* forms the basis of the complaint in ground 2 of the appeal. It is set out in section 7 as follows:-

> ***"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 can 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."***

In **Black's Law Dictionary**, ninth Edition *res judicata* is defined as:

> ***"(i) an issue that has been definitively settled by judicial decision;***
>
> ***(ii) An affirmative defence barring the same claim or any other claim arising from the same transaction, or series of transactions and that could have been- but was not-raised in the first suit".***

In **Henderson –vs- Henderson (1843-60) ALL E.R. 378**, the following observation was made:

> ***"…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 a 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 case, 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".***

See also **Uhuru Highway Development Limited –versus Central Bank of Kenya & 2 others [1996] eKLR**, where in the Court held *inter alia* that, in order 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 has been raised once again in a fresh suit.

In the light of the above threshold, it is our finding that there is no dispute that the substratum and the reliefs sought in Kericho HCCC Number 23 of 2009 were similar to those sought in ELC number 54 of 2014. Kericho HCCC 23/2009 having been dismissed for non-attendance before the issues therein were determined on merit, the doctrine of *res judicata* can only operate to taint ELC 54/2014, if the order of dismissal for non-attendance amounted to a final Judgment of the Court. The trial Judge relied on the case of **Salem Ahmed Hasson Zaidi versus Faud Hussein Humeidan** (supra), where the predecessor of the Court construed and applied Rule **178** of the rules of the Court as it was then, and held that an order of dismissal for non-attendance was final in nature and therefore amounted to a final Judgment of the court.

The Judge went further and made observations that Rule 178 of the rules of the Court as it was then was couched in similar terms as the current order **12** rule 3(1). It provides:

> ***"Rule 3 (1) "if on the day fixed for hearing, after the suit has been called on for hearing outside the Court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the Court".***

We have considered the decision in the **Salem Ahmed Hassan Zaidi** case (supra) in the light of the provisions of order **12** Rule **3 (1) (CPR),** and are in agreement that order **12** Rule **13(1**) is couched in similar terms as Rule **178** as it was then. It therefore follows that the Judge after considering the record before him in the light of order **12** Rule **3(1**) which was couched in similar terms as Rule **178** of the rules of the court, as it was then arrived at the correct conclusion that an order of dismissal for non-attendance is in the nature of a final Judgment.

We adopt the same position in this appeal and hold that the order of dismissal for non-attendance made by **C.M. Waithaka, J** on the 29th day of May, 2011 amounted to a final Judgment.

The above finding now leads us to determine the appropriate remedy the appellant ought to have taken to redress his default. The answer to this question as correctly put by the trial Judge lies in our construction of order **12** Rule **6(1) & (2)** of the CPR**.** These provide as follows:

> ***6 (1) Subject to sub rule (2) and to any law of limitation of actions, where a suit is dismissed under this order, the plaintiff may bring a fresh suit.***
>
> ***6 (2) when a suit has been dismissed under rule 3, no fresh suit may be brought in respect of the same cause of action.***

It is not disputed that the word "may" appears in both sub rules. We have construed the above sub rules and considered them in the light of order 12 Rule 7 CPR as well as the rival submissions on this issue. It is our finding that upon dismissal of Kericho HCCC No. 23 of 2009, under order 12 rule 3(1) of the CPR for non-attendance, the appellant had two options to redress his default. The first was for him to simply file a fresh suit. The second was for him to seek review and setting aside of the order dismissing his suit for non-attendance, under order **12** Rule **7** CPR. It is undisputed that the appellant unsuccessfully availed himself of the order 12 Rule 7 procedures but lost. He initiated an appellate process which he later abandoned.

Order **12** rule 7 provides as follows:

> ***"(7) Where under this order Judgment has been entered or the suit had been dismissed, the Court on application, may set aside or vary the Judgment or order upon such terms as may be just."***

In the light of the above provision (order 12 rule 7 CPR), when considered in conjunction with the provisions of order **12** rule **6(1)** & **6(2)**, it is our view that the word "may" in both order **12** Rule **6(1) & (2)** CPR (supra), applies where that option is taken as the first option. We find nothing in the said provision that permits a party to use that Order **12** Rue **6 (1)** & **(2)** as a fall back on after losing under the procedure provided for under order **12** rule **7** of the **CPR**.

The above finding notwithstanding, we have been urged to save the appellants' right to pursue his proprietary rights over the suit property by applying the principle in Article 159 (2) (d) of the Kenya Constitution on the one hand and Article 50 on fair hearing on the other hand. The parameters for the invocation and application of the principle in Article **159 (2) (d)** have now been crystalized by case law. In **Jaldesa Tuke Dabelo versus IEBC & Another [2015] eKLR**, the court held inter alia that:

> ***"rules of procedure are hand maidens of justice and where there is a clear procedure for redress of any grievance, prescribed by an Act of Parliament that procedure should strictly be followed as Article 159 of the Constitution was neither aimed at conferring authority to derogate from express statutory procedures for initiating a cause of action".***

In **Raila Odinga and 5 Others versus IEBC & 3 Others [2013] eKLR** the Supreme Court stated that the essence of **Article 159** of the Constitution is that a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties depending on the appreciation of the relevant circumstances and the requirements of a particular case. In **Lemanken Arata versus Harum Meita Mei Lempaka & 2 Others eKLR** it was stated that the exercise of the jurisdiction under Article 159 of the Constitution is unfettered especially where procedural technicalities pose an impediment to the administration of justice. Lastly in **Patricia Cherotich Sawe versus IEBC & 4 Others [2015] eKLR** it was stated that **Article 159(2) (d)** of the Constitution is not a panacea for all procedural short fall as not all procedural deficiencies can be remedied by it. **all procedural deficiencies can be ree**In the light of the above enunciations on the construction of Article **159 (2) (d**) of the Kenya Constitution, 2010, we find no trace in the said Article that can cure the appellant's failure to follow the correct procedure to redress his grievance after losing out on his application for review and setting aside.

As for the alleged denial of the right to be heard under Article 50 of the Kenya Constitution, 2010, we find no trace of such an infringement on the record. The record is clear that the appellant all along participated fully at each and every stage of the proceedings that gave rise to this appeal. He lost because of the failure to follow the correct procedure to redress his default, after making an election to pursue a remedy under Order **12** rule **7** CPR (supra), as opposed to availing himself of the remedy falling under order **12** rule **6(1) & (2)** CPR (supra), in the first instance. That in our view does not amount to a denial of a fair hearing in the spirit and tenor of Article 50 of the Kenya Constitution, 2010.

The upshot of the above is that we find no merit in this appeal. It is hereby dismissed with costs to the respondent.

Dated and delivered at Nakuru this 18th day of October, 2018.

R. N. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR