Alluya & 4 others v Too (Civil Appeal 58 of 2019)
[2022] KECA 1393 (KLR) (16 December 2022) (Judgment)

Neutral citation: [2022] KECA 1393 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 58 OF 2019

PO KIAGE, M NGUGI & F TUIYOTT, JJA

DECEMBER 16, 2022

BETWEEN

PERIS SHANYASI ALLUYA ..... 1ST APPELLANT

JOYCE KABURANI ..... 2ND APPELLANT

JAPHETH LUGAFA SHIKONYERE ..... 3RD APPELLANT

LEAH MUSIMBI ..... 4TH APPELLANT

LENA SOKONI ..... 5TH APPELLANT

AND

KIBUTUK ARAP TOO ..... RESPONDENT

(An appeal from the judgment and decree of the Environment and Land Court of Kenya at Eldoret(M.A. Odeny, J.) Dated 31st October, 2017 in Eldoret E&L Case No. 41 of 2016)

JUDGMENT

JUDGMENT OF F TUIYOTT , JA

1. The dispute that gives rise to this first has a long history. It involves two land parcels; Nandi/Kapkangani/1439 and Nandi/Kapkangani/2211, both registered in the name of Kibutuk Arap Too (the respondent). The green card to parcel No 2211 shows that it resulted from subdivision of Nandi/Kapkangani/1391 while parcel No 1439, resulted from the subdivision of 1391. Unhappy that Peris Shanyasi Alulu, Joyce Kaburani, Japhet Lugafa and Leah Musimbi (the appellants), occupied portions of the two land parcels, the respondent sought their eviction in proceedings taken out as Eldoret Environment and Land Court Civil Case No 41 of 2016.

2. This would not be the first time that the respondent sought eviction of Peris, because he had filed Kapsabet PMCC No 36 of 2006 against her, and Peter Adeya and Jane Muhonja. In those proceedings,

the respondent asserted that the defendants occupied portions of Nandi/Kapkangani/1391 and Nandi/Kapkangani/1239. The plea was however unsuccessful because the court found that plot No 1239 was not registered in the name of the respondent and that parcel No 1391 had been subdivided into various portions one of which is parcel 1439, one of the properties which is the subject of the current litigation.

3. Responding to the claim at the ELC, the appellants first sought to correct a misname of parties. They contended that the 1st defendant was Peris Alulu and not Peris Shanyasi Alluya, the 3rd defendant was Japhet Lungafa and not Japhet Lugafa Shikonyere, the 4th defendant was Leah Musimbi Kevedi and not Leah Musimbi and the 5th defendant was Helena Sokoni and not Lena Sokoni. They averred that they were in occupation, possession and use of the suit land and their stay has been long, uninterrupted and continuous and to the exclusion of the respondent.

4. In a counterclaim, they sought the following orders;

    a. A declaration that the defendants are entitled to exclusive and unimpeded right of possession and occupation of all that piece of land known as Nandi/Kapkangani/1439 and Nandi/Kapkangani/2211 ('the suit properties') and that the plaintiff whether by himself or their servants or agents or otherwise howsoever is not entitled to claim the suit property.

    b. A declaration that the plaintiff whether by himself or his servants or agents or otherwise howsoever from wrongfully moving in to occupy the suit property and will accordingly be a trespasser on the same and be Injuncted from the land.

    c. An order of transfer of the whole of Nandi/Kapkangani/1439 and Nandi/Kapkangani/221 to the defendants jointly and severally in their respective portions as they occupy on the suit land and in default the honourable court do order their execution through the executive officer.

    d. Costs of the suit.

    e. Any other or further order that the court may deem fit.

5. At trial, three witnesses gave evidence, two for the plaintiffs and one for the defence. The respondent reiterated the contents of his plaint and added that he obtained the two parcels of land by dint of a decree in Kapsabet Land Dispute Tribunal No 34/2005 which was adopted as an order of court. It was his testimony that Peris brought the other appellants into the land and his attempt to build houses on the land has been resisted by the appellants who demolished them. The respondent lives elsewhere at a place called Kamobo, at his brother's farm. He states that he has lived there for more than twenty years. He however stated that Peris could be given 1 acre.

6. Peter Kiptanui Butuk (PW2) is a son of the respondent. It was his evidence that the land dispute tribunal awarded 1 acre to Peter Ateya and 1 acre to Peris. That while Ateya took his parcel and lives there, Peris, who had been removed, has returned to a portion of the suit land. He elaborated that all the appellants are in occupation of parcel No 1439 save for Leah who is in parcel No 2211.

7. In her testimony Peris opted to adopt her recorded statement filed in court on September 14, 2017 dated September 6, 2017 as her evidence in defence.

8. In holding in favour of the respondent, the trial court made the following findings; The respondent was the registered owner of the suit land; the claim by the 2nd to 5th appellants lies against Peris; Peris owns parcel No 2209 which was awarded to her, the suit was not res-judicata Civil Case No 34/2006; the appellants did not lead sufficient evidence to prove that they had adversely acquired the suit land; and that the appellants could only apply to be registered as proprietors of land by way of adverse possession

under order 37 of the *Civil Procedure Rules* through proceedings commenced by way of originating summons.

9. This first appeal raises seven (7) grounds which are collapsed into three. That the learned judge erred in law and in fact in:

   a. arriving at a conclusion that the suit was not res- judicata, Kapsabet Civil Case No 36 of 2006.

   b. misapprehending the facts and reaching a faulty decision that the appellants had not proved their claim for adverse possession.

   c. not finding that the appellants had proved existence of misrepresentation or fraud on the part of the respondent in acquisition of the letters to the suit land.

10. As this is a first appeal, the mandate of this court is to re-evaluate the evidence afresh and to draw our own conclusion having regard to the fact that, unlike the trial court, we have not seen or heard the witnesses testify. This position was stated in the case of *Selle & Another v Associated Motor Boat Company Ltd & Others [1968] EA 123* as follows:-

> ' I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955) 22 EACA 210).'

11. Mr Choge holding brief for Mr Kagunza, learned counsel for the appellants, submitted that the parties in the ELC and those in Kapsabet CMCC No 34 of 2006 and in particular the 1st appellant and the 1st respondent were the same, the suit properties the same and the claim the same. This court was asked not to allow the re-litigation of the same question.

12. In Kenya, the doctrine of res judicata finds statutory expression in section 7 of the *Civil Procedure Act* which reads.

> 7. Res judicata
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> 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.
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> Explanation. —(1) The expression 'former suit' means a suit which has been decided before the suit in question whether or not it was instituted before it.
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> Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

13. It is not disputed that save for Peris, the other four appellants were not party to the proceedings in Civil Suit No 34 of 2006 and we are not told that the four appellants defended or mounted the counterclaim before the ELC under the same defence or claim put forward by the defendants in the earlier case. Quite clearly as against these four appellants, their claim before the ELC could not be caught up by the doctrine of res judicata.

14. Turning to Peris, it is true that she was a defendant in PMCC No 34 of 2006. It is also true that although one of the parcels of land in those proceedings was parcel No Nandi/Kapkangani/1391, it later turned out that the parcel number had ceased to exist upon its subdivision to five different parcels. It was for this reason that the subordinate court held that it could not make orders in respect to land that did not exist. In respect to the other parcel being 1239 the Kapsabet court held;

> ' I do find that this court has also no jurisdiction to issue orders against it yet the owner is deceased and no administrator had been approached by the court the plaintiff could have sued the right person in relation to the suit land.'

15. It is evident that the court at Kapsabet had not heard and finally decided the controversy between the respondent and Peris as the dispute was not determined on the merits. For res-judicata to operate, the issue raised in the subsequent suit must have been directly and substantially in issue as a matter that had been heard and finally decided by the earlier court. Discussing this aspect of res-judicata this court has previously observed in *Margaret Mumbi Kagiri v Kagiri Wamairwe [2012] eKLR;*

> ' Even if we are wrong on this, under section 7 of the *Civil Procedure Act* reproduced herein above, a matter is res judicata if it 'has been heard and finally decided' in an earlier suit. A matter is not heard and finally decided unless it is heard and determined on its merits. In other words a matter is not res judicata unless the earlier decision was based on a hearing of the suit on its merit. See this court's decisions in Kibogy v Chemweno [1981] KLR 35 and Wanguhu v Kania [1987] KLR 51.'

16. While the appellants submit they had proved misrepresentation and fraud on the part of the respondent in acquisition of the suit property, their arguments do not attempt to impeach the learned trial judge's finding that:

> ' The defendants did not plead any particulars of fraud or misrepresentation in their defence and counterclaim'

17. It is common learning that fraud and misrepresentation must be specifically pleaded and particulars thereof set out. See *Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR*. The

part of the appellants' claim that was founded on fraud and misrepresentation, having not been pleaded, could not go any further.

18. On the final matter of adverse possession, counsel for the appellants submitted that PW2 admitted that the appellants were in occupation of the suit property; it was never seriously contended that the appellants had been on the suit parcel for over 12 years as from 1972 and that the respondent had never been on the suit parcels for over 12 years from 1972; and that the respondent had no problem with the 1st appellant being granted 1 acre of the suit land.

19. It is the appellants who asserted adverse possession and the onus was theirs to prove it. Looking at the evidence before the ELC, I am unable to find any concession by the respondent or his witnesses that the appellants had been in quiet and continuous occupation since 1972. It is true that the respondent testified that he had lived in Kamobo for over twenty years but he did not concede that the appellants had been in possession of the disputed land all this time. Instead, there is this evidence by PW2;

> ' Peris was removed and came back as she refused to move to the land she was given. The court gave us an eviction order and we evicted the illegal trespass including Peris.'

20. On the part of Peris who was the only witness for the appellants, there was a dearth of evidence as to how long she had been in possession. No evidence as to the length of time the occupation was uninterrupted or undisturbed. She did not debunk the evidence that she was removed from the land only to return. The learned trial judge cannot therefore be faulted for finding that:

> ' The defendant did not lead sufficient evidence to prove that they have adversely acquire (sic) the plaintiff's suit land. They have not been in quiet, uninterrupted occupation as claimed by the 1st defendant. There have been interruptions including evictions and the current suit which shows that their occupation has not been peaceful. I find that they have not met the threshold for grant of the orders for adverse possession. Even if they had met the threshold the procedure they chose to follow to assert their rights would not have made them to be registered as owners. The law is very clear on this.'

21. As to the argument that the respondent had conceded to Peris getting 1 acre, I think that the evidence needs to be looked at in totality. It has to be remembered that before the LDT, Peris had been awarded 1 acre that was later designated as parcel no 2209. A grievance by the respondent both at the Kapsabet Court and the ELC is that Peris had refused to move to that parcel and instead insists on remaining on the suit land. It seems to me that the 1 acre which the respondent does not contest is the one comprised in parcel no 2209 and not part of the suit land. Again, there is no reason to fault the holding of the ELC.

22. Ultimately, I find no merit in the appeal and I would propose its dismissal with costs to the respondent.

JUDGMENT OF KIAGE, JA

I have had the advantage of reading in draft the judgment of Tuiyott, JA. I entirely agree with his reasoning and conclusions, and have nothing useful to add.

As Mumbi Ngugi, JA is also in agreement, the final orders in the appeal are as proposed by Tuiyott, JA.

JUDGMENT OF MUMBI NGUGI JA

I have read in draft the judgment of my brother Tuiyott, JA with which I am in full agreement and there would be no utility in my adding anything thereto.

DATED AND DELIVERED AT KISUMU THIS 16TH DAY OF DECEMBER, 2022.

P.O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEL

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.