REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

HIGH COURT CIVIL APPEAL NO. 67 OF 2015

PETER WANG'OMBE JORAM .....APPELLANT

VERSUS

GLADYS NDEDA.....RESPONDENT

(Being an appeal from the ruling and order of the Chief Magistrate's Court at Nakuru (Hon. L. Komingoi, Chief Magistrate) delivered on 30th April 2015 in Nakuru CMCC No. 147 of 2011 Gladys Ndiege v Gladys Ndeda)

JUDGMENT

1. Litigation in this matter traces its roots to 10th March 2011 when one Gladys Ndiege (hereinafter 'Ndiege') filed Nakuru CMCC No. 147 of 2011 against the respondent herein. She averred that by an agreement dated 16th December 2009, she sold her interest in plot number 62 Kabachia (hereinafter 'the suit property') to the respondent and that the respondent breached the agreement by paying only a portion of the purchase price thus leaving KShs 250,000 outstanding. She further averred that the respondent broke into the suit premises and took away her goods with a view to evicting her. She therefore sought judgment against the respondent for a permanent injunction restraining the respondent her agents, servants and/or employees from interfering with her occupation of the suit property; a mandatory injunction directing the respondent to return all the household goods removed from the suit property; general damages for breach of contract, trespass and unlawful attachment and detention of the her household goods; a declaration that the respondent was in breach of the terms and conditions of the sale agreement and that the respondent was not entitled to take possession of the suit property; and that she refunds the monies paid by the respondent after deducting whatever was due to her.

2. The respondent filed a defence and counterclaim in which she sought dismissal of Ndiege's case. She also sought judgment against Ndiege for *inter alia* specific performance of the agreement and general damages for breach of contract in lieu of or in addition to specific performance.

3. Upon hearing the matter, judgment was delivered on 17th October 2013 by L. Komingoi Senior Principal Magistrate (as she then was). The learned magistrate ordered the respondent to pay to Ndiege a sum of KShs 250,000 being the balance of the purchase price and a further KShs 250,000 on or before 17th December 2013 and that upon those payments Ndiege to vacate the suit premises and hand vacant possession to the respondent. Each party was ordered to bear own costs.

4. The appellant herein was not a party to the proceedings in the subordinate court from inception to delivery of judgment. He sought to intervene in the matter initially through Notice of Motion dated 15th January 2014 and later through Notice of Motion dated 17th November 2014. As is manifest, both applications were filed after delivery of judgment.

5. The appellant sought the following orders in Notice of Motion dated 17th November 2014:

1. THAT this application be certified as urgent and be heard on priority basis.

2. THAT the court be pleased to enjoin the Applicant in this suit as Defendant and or Interested Party.

3. THAT pending the hearing and determination of this application inter-partes there be stay of execution of the judgment and decree of this court delivered on 17th October, 2013.

4. THAT the court be pleased to set aside and or review the ruling delivered on 16th October, 2014.

5. THAT the court be pleased to set aside and review the judgment and decree entered herein on 17th October, 2013.

6. THAT the costs of this application be provided for.

6. The application was also heard before L. Komingoi Senior Principal Magistrate (as she then was) who dismissed it with costs in a ruling delivered on 30th April 2015. Aggrieved by the ruling, the appellant filed the present appeal, listing the following grounds of appeal in the Memorandum of Appeal dated 22nd May 2015:

1. THAT the Learned trial Magistrate erred in law and fact in dismissing the Appellant's application without considering all the issues raised in the said application.

2. THAT the Learned trial Magistrate erred in law and fact in holding that the Appellant's application was an abuse of the court process.

3. THAT the Learned trial magistrate erred in law and fact in finding that the instant application was a replica of the application dated 15th January, 2014.

4. THAT the Learned trial Magistrate erred in law and fact in failing to consider the legal effect of the consent recorded to enjoin the Appellant in the proceedings before her deciding the application dated 17th November, 2014.

5. THAT the Learned trial Magistrate erred in law and fact in failing to appreciate the Appellant's interests in the suit.

6. THAT the Learned trial Magistrate erred in law and fact in holding that the Appellant did not provide sufficient reasons why the judgement of the trial court should be reviewed when there was sufficient evidence before the court.

7. THAT the Learned trial Magistrate erred in law and fact in holding that the Appellant did not satisfy the legal requirements of Order 45 0f the Civil Procedure Rules when the application before the court was for review of previous orders.

8. THAT the Learned trial Magistrate erred in law and fact in holding that most issues raised by the Appellant before her could not be raised as the court has become functus officio after delivery of the judgement.

9. THAT the trial court erred in law and fact in failing to appreciate the provisions of section 34 of the civil Procedure Act before arriving as its decision to dismiss the Appellant's application

THAT the trial magistrate's decision of dismissing the Appellant's application denied the Appellant justice as he was condemned
11. THAT the trial court erred in law and fact in holding that the Appellant's list of authorities were irrelevant to the case even when the trial court had relied on some of the said authorities in dismissing the Appellant's earlier application.

12. THAT the learned trial magistrate was unfair and arrived at the decision without due consideration of the law and fact before her.

13. THAT the entire ruling was arrived at without proper consideration of the law and evidence.

7. The appeal was canvassed through written submissions. The appellant argued that having been made a party to the case even if after judgment, he was entitled to be heard on his application dated 17th November 2014 and in the suit generally. That by holding that the application was res judicata, the learned magistrate shut him out and deprived him of a fair hearing. The appellant further argued that application dated 17th November 2014 could not be res judicata since his earlier application dated 15th January 2014 was determined before he was made a party to the suit. Citing **Order 45** of the **Civil Procedure Rules**, the appellant argued that the fact that he had acquired the suit property constituted new and important evidence that warranted a review of the judgment. Finally, the appellant relied on **section 34** of the **Civil Procedure Act** and faulted the learned magistrate for holding the view that the issues raised by the appellant ought to be raised in a separate suit.

8. On her part, the respondent argued that the appellant's earlier application sought setting aside of the judgment herein just like the application dated 17th November 2014. Consequently, the court was right in declaring the latter application *res judicata*. Arguing that illegal contracts are not enforceable and that the court never rewrites contracts for parties, the respondent wondered aloud why the appellant is not pursuing Ndiege for a refund of any money he paid to her.

9. I have considered the grounds of the appeal and the respective submissions of parties. This being a first appeal, my mandate is to re-evaluate, re-assess and re-analyse the evidence on record and determine whether the conclusions reached by the learned magistrate are to stand or not and give reasons either way. See **Global Apparels (EPZ) Limited v Attorney General & 2 others [2019] eKLR**.

10. I will consider grounds 1, 2, 3, 6, 7, 8, 11, 12 and 13 of the appeal together and lastly grounds 4, 5, 9 and 10 together. The first group of grounds relates to the appellant's complaint that the learned magistrate denied him a hearing when she held that the application before her was an abuse of process since it was a replica of the appellant's earlier application dated 15th January 2014. I have reproduced the application dated 17th November 2014 at paragraph 5 above. For purposes of comparison, I now reproduce the prayers sought in Notice of Motion dated 15th January 2014. They were that:

1. THAT this Honourable Court be pleased to certify this matter as urgent and hear it on a priority basis.

2. THAT the Judgment delivered in this case on 17/10/2013 and all the consequential orders be set aside.

3. THAT the Applicant be granted leave to file his defence.

4. THAT this Honourable court be pleased to issue an order of temporary injunction restraining the 3rd Respondent from entering into, remaining in, trespassing into or in any other way interfering with the Applicant's possession and occupation of Title Number Nakuru Municipality Block 10/145 otherwise known as Kabachia Phase II House No. 62 pending the final determination of this suit.

5. THAT this honourable Court be pleased to grant an order for a mandatory injunction removing the 3rd Respondent from Title Number Nakuru Municipality Block 10/ 145 otherwise known as Kabachia Phase II House No. 62 pending the final determination of this suit.

6. THAT the costs of this Application be provided for. [Emphasis supplied].

11. For some strange reason, Notice of Motion dated 15th January 2014 was given its own new heading, different from the heading of the original suit that was determined through the judgment delivered on 17th October 2013. In the application Ndiege was termed the 1st respondent, the appellant herein was applicant, National Housing Corporation was termed 2nd respondent while the respondent herein was 3rd respondent. Upon hearing the application, the learned magistrate found no merit in it and dismissed it. The court stated in part as follows:

Judgment was delivered on the 17/10/2013 and the 1st respondent claim was dismissed.

The defendant was ordered to make further payments to the plaintiff after which the said plaintiff was to transfer the house to the defendant.

The defendant complied fully by the judgment.

The applicant in the application dated 15/1/2014 was not a party to the suit which was heard to conclusion. He therefore cannot ask the court to set aside the judgment and other consequential orders thereto.

He cannot benefit from section 34 of the Civil Procedure Act as he was not a party to the suit.

He should file a fresh suit against the plaintiff/1st Respondent and the 2nd Respondent, National Housing Corporation if he has any claim.

The plaintiff/1st defendant purported to enter into an agreement with the Applicant Peter Wangombe Joram when she knew the matter was pending for

Judgment.

I therefore find that the Application cannot get any relief in the present suit.

A court cannot issue a Mandatory injunction until the suit is heard.

The 2nd Respondent National Housing Corporation was served with the two

Applications but they neglected to attend court.

I find no merit on the application dated 15/1/2014 and the same is dismissed with no orders as to costs …

12. Later, while dismissing the application dated 17th November 2014, the learned magistrate stated as follows:

I have gone through the records. I find that the Applicant had brought the same application he brought earlier dated 15/1/2014. The same was heard and the ruling delivered on 16/10/2014. The present application is a replica of the application dated 15.1.2014.

It's an abuse of the court processes.

The Application seeks that the judgment of 17/10/2013 be set aside and/or reviewed.

At the time of the Judgment the Applicant was not a party to the proceedings.

The Applicant has not given any sufficient reasons as to why the judgement should be reviewed.

The application herein does not satisfy the condition set out in order 45 of the Civil Procedure rules.

Most of the issues raised by the applicant are those that cannot be canvassed before court as the court became functus officio when it delivered the Judgment on 17/10/2013.

The authorities cited by the Applicants counsel are not relevant to this case.

I find no merit in this application and the same is dismissed with costs to the

Defendant/Respondent.

13. The appellant had sought to join the proceedings on the basis that he purchased the suit property from Ndiege pursuant to a sale agreement dated 28th June 2013. The record shows that the hearing of the suit concluded on 23rd May 2013 and that the court retired to write judgment on 8th August 2013. Ndiege actively participated in the matter and was aware of all these milestones. Consequently, when she entered into a sale agreement with the appellant on 28th June 2013, she fully was aware of the prevailing circumstances and in particular that judgment was scheduled for delivery on 17th October 2013.

14. A comparison of the two applications reveals a common thread running through them: the appellant sought setting aside or review of the judgment. The appellant wanted to reset the clock so that he could participate in a fresh resulting hearing. His basis for doing so was that he had bought the suit property pursuant to the sale agreement dated 28th June 2013. All other order sought in the applications were peripheral: the appellant could only urge them meaningfully if the judgement was set aside or reviewed.

15. The court having determined Notice of Motion dated 15th January 2014, the appellant was estopped from once again seeking setting aside or review of the judgment. The issue became *res judicata*. Similarly, the issue of whether or not stay of execution of the judgment and decree could be granted was substantially in issue when the court determined Notice of Motion dated 15th January 2014 and was thus *res judicata* too.

16. The Court of Appeal discussed the essence of res judicata in **Maithene Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others [2018] eKLR** as follows:

30. The essence of the doctrine of res judicata was aptly set out by this Court in William Koross vs. Hezekiah Kiptoo Komen & 4 Others [2015] eKLR-

"The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.

…

The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties –because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit.

…

… one of the fundamental tenets of the doctrine as espoused by wigram VC in Henderson vs. Henderson [1843] Hare 100, 115 [is] that-

"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 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."

17. Although the learned magistrate considered and dismissed the application, the matter was clearly *res judicata* and an abuse of the court's process. Notice of Motion dated 17th November 2014 was for striking out. I hereby strike it out with costs to the respondent (Gladys Ndeda). That resolves grounds 1, 2, 3, 6, 7, 8, 11, 12 and 13 of the appeal.

18. Under grounds 4, 5, 9 and 10 the appellant complained that he was condemned unheard. While the right to a hearing is an important part of our law, a litigant is under a duty to frame an appropriate case for consideration by the court. It is not the duty of

the court to sustain on life support whatever manner of terminally afflicted proceedings that are placed before it. The learned magistrate considered both Notice of Motion dated 15th January 2014 and Notice of Motion dated 17th November 2014. Rulings were delivered on each of them. The appellant was thus given an adequate hearing. He probably wanted to be heard on the main suit as well. That cannot happen considering that he arrived on the scene after judgment and was not a party to the suit at the stage of judgment. I also find the circumstances in which he claims to have bought the suit property while the matter was pending for judgment to be quite telling. If he really believes that he has a case, he should seek legal advice and perhaps pursue Ndiege who sold him the suit property while fully aware of the impending judgment. I equally find no merit in grounds 4, 5, 9 and 10 of the appeal.

19. In view of the foregoing discussion, this appeal has no merit. It is dismissed with costs to the respondent.

Dated, signed and delivered in open court at Nakuru this 30th day of October 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Waiganjo for the appellant

No appearance for the respondent

Court Assistants: Beatrice & Lotkomoi