



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: MUSINGA, KIAGE & GATEMBU J.J.A.)**

**CIVIL APPEAL NO. 66 OF 2019**

**BETWEEN**

**ALKA ROSHANLAL HARBANSLAL SHARMA....1ST APPELLANT**

**MAMTA ROSHANLAL SHARMA.....2ND APPELLANT**

**AND**

**THERESA CONSTABIR.....RESPONDENT**

(Being an appeal against the Ruling of the Environment and Land Court of Kenya at Malindi (J. O. Olola, J.) delivered on 14th March 2019 in E.L.C Case No. 233 of 2017.)

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**JUDGMENT OF THE COURT**

1. There is only one central issue for determination in this appeal, and that is whether *Environment and Land Court (ELC) Case No. 233 of 2017* at Malindi between the appellants herein and the respondent, the Land Registrar, Mombasa and the Attorney General was *res judicata* by dint of an earlier determination by the *ELC No. 39 of 2013* of the same dispute between the same parties and on the same subject matter, and also on account of this Court's judgment in *Civil Appeal No. 44 of 2014*.

2. In a ruling delivered by *Olola, J.* on 14th March 2019 in ELC NO.233 of 2017, the learned judge upheld a Preliminary Objection that had been raised by the respondent to the effect that the said suit was *res judicata* and proceeded to strike it out with costs to the respondent.

3. Being aggrieved by that decision, the appellants preferred an appeal to this Court, urging us to set aside the impugned ruling and substitute therefor an order that the suit be heard and determined on merit.

4. The brief facts of the suit that gave rise to this appeal were that the appellants as the legal representatives of the estate of *Kulta Hanspal*,(deceased), filed a suit seeking, *inter alia*, a permanent injunction to restrain the respondent, the Land Registrar, Mombasa, and the Attorney General from subdividing, alienating, disposing of and/or transferring parcels of land known as *Plots*

*Nos.848/111/MN, 849/111/MN, 850/111/MN, 851/111/MN and 852/111/MN* (the suit properties) situate at Vipingo within Kilifi County and/or dealing with the suit properties in any manner whatsoever detrimental to the rights and interests of the appellants. The appellants also sought surrender of the provisional certificates of titles issued on 22nd November 2016 to the respondent by the Land Registrar, Mombasa in respect of the suit properties so that the appellants could continue holding them as security till redemption of the same through repayment of Kshs.800,000 that had been advanced by the deceased to the respondent to enable her purchase the suit properties.

5. The appellants argued that following the said advancement, the respondent deposited the original title deeds and executed transfers with the deceased; that upon the death of the deceased in 2012 the appellants in sincere belief that the sum of Kshs.800,000 was on account of purchase of the suit properties, proceeded to register the transfers and were thereafter issued with title deeds/certificates of title; that the respondent sued the appellants in **ELC No. 39 of 2013** claiming that she had never sold or transferred the suit properties to the appellants.

6. In a judgment delivered in the aforesaid matter on 25th November 2013, the ELC found in favour of the respondent. The court established that the respondent had borrowed Kshs 800,000 from the deceased; that she had deposited the certificates of title of the suit properties and signed transfers with the deceased; and that the appellants had unlawfully purported to transfer the suit properties from the respondent to some third parties. Consequently, the trial court ordered the appellants to surrender the certificates of title for cancellation. The appellants did not comply with the said order.

Consequently, the respondent applied and was issued with provisional certificates of title.

7. In turn, the appellants filed another suit, *ELC Miscellaneous Application No. 24 of 2014* at Malindi against the respondent, seeking *inter alia*, vesting orders in their favour in respect of the suit properties by virtue of an informal charge created out of advancement of the Kshs.800,000 in 1988 upon the deposit of the certificates of title as per *section 79* of the Land Act.

8. That suit was opposed on the ground that it was *res judicata* and that the issue of proprietorship of the suit properties ought to have been raised in ELC No. 39 of 2013. *Angote, J.* struck out the subsequent suit on the basis that it was premature since the appellants had not issued statutory notices to the respondent as required under *sections 90 and 96* of the *Land Act*. The learned judge however stated that the appellants were at liberty to move the court for appropriate orders once they served statutory notices upon the respondent.

9. The respondent was aggrieved by that finding and lodged an appeal to this Court, *Civil Appeal No.44 of 2014*. In a judgment delivered on 11th December 2015, this Court overturned the decision of Angote, J. in ELC Miscellaneous Application No. 24 of 2014. It held that the matter was *res judicata*.

10. It is on the basis of the foregoing that Olola, J. upheld the respondent's Preliminary Objection that ELC No. 233 of 2017 was *res judicata* and an abuse of the Court process.

11. Undeterred, the appellants moved to this Court to challenge the above finding, stating that the learned judge erred in law: by not appreciating that the issues raised in ELC No. 233 of 2017 were new issues that could not have been raised in the previous suit, ELC No.39 of 2013, in that the processing and issuance of the provisional certificates of title was after determination of the former suit; in not appreciating that the respondent in the former suit did not pray to have the certificates of title returned back to her; by not appreciating that the possession and/or continued possession of the certificates of title effectively terminated the loan relationship between the appellants and the respondent; that by striking out the suit the court sanctioned the unlawful termination of the contract;

by not appreciating that the appellant was to continue holding the certificates of title while the respondent was to continue possessing her parcels of land as long as the loan remained unpaid; and in failing to appreciate that the suit was not for determination of ownership or proprietary rights over the suit properties but for preservation of the loan relationship between the parties until redemption of the properties by the respondent.

12. When the appeal came up for hearing, **Mr. Kenga** was in attendance for the appellants and **Mr. Mogaka** for the respondent. Counsel relied on their written submissions, which they briefly highlighted.

13. We have carefully considered all the submissions on record. As we stated at the beginning, the only issue for determination in this appeal is whether the suit that gave rise to this appeal is *res judicata* in view of the decisions in earlier cases, **ELC No. 39 of 2013** and **Civil appeal No. 44 of 2014**.

**14. Section 7 of the Civil Procedure Act** states that:

**“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.”**

15. The gravamen of the appellants’ submissions is that in the earlier suits there was no order for issuance of provisional certificates of title to the respondent and therefore that issue could not have been *res judicata*. Further, the court did not consider in the earlier suits whether the respondent could lawfully have the certificates of title to the suit properties without having repaid the loan advanced to her. Counsel argued that in the earlier suits the appellants could not pray for certificates of title since they were holding the same, and therefore, in his view, the learned judge was wrong in holding that the suit was *res judicata*.

16. Regarding the issue of repayment of the loaned sum, the respondent’s counsel submitted that in the first suit it was demonstrated that the appellants refused to accept repayment of the advanced sum, saying that the land had been sold to the deceased and they were lawfully holding the certificates of title. The trial court rejected that argument, in effect reiterating that the suit properties lawfully belonged to the respondent, but the sum of Kshs 800,000 that she obtained from the deceased had not been repaid.

17. In determining this appeal, we think the words of this Court in

**The Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR** bear repetition. The Court stated:

**“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.”**

18. Similarly, this Court has severally held that *res judicata* is not confined to issues which a court was actually asked to decide upon, it also covers issues or facts which are clearly part of the subject matter of the litigation and therefore could have been raised in earlier proceedings between the parties, and would be an abuse of the court process to allow new proceedings to be commenced. See Hudson Kelly A. Agalov Telkom Kenya Limited [2016] eKLR.

19. At paragraph 12 of the appellants' plaint in ELC 233 of 2017, the appellants stated:

**“12. The plaintiffs further aver that following the judgment delivered on 25<sup>th</sup> October 2013, aforementioned, a decree was prepared for the plaintiffs to deliver and/or surrender the original Title Deeds for rectification and/or cancellation and/or deletion of some entries and restore back the ownership of the suit premises to the 1<sup>st</sup> Defendant and that in default provisional certificates to be issued in favour of the 1<sup>st</sup> Defendant BUT no specific orders were made by the court for the 1<sup>st</sup> Defendant to get back the provisional certificates as that would mean defeating the very purpose of the certificates of titles held by the 1<sup>st</sup> plaintiff as security for the re-payment of the loan sums and/or money's worth.”**

20. Further at paragraph 17 of the plaint, the appellants stated that their claim for surrender of the provisional certificates of title was for them to hold the certificates as security till their redemption by repayment of the loan sum plus interest.

However, the appellants do not seem to be keen on pursuing the issue of repayment of the money. In the judgment by Angote, J. in ELC No. 39 of 2013, the learned judge noted that the respondent was ready to repay the appellants Kshs.15 million being the agreed amount with the deceased before his demise, but it appears that the appellants want to be paid much more than that.

21. In all the suits that the appellants have instituted or defended they have not sought repayment of whatever amount of money they believe to be due and repayable to them by the respondent. They only seem to be pursuing their right to hold the certificates of title to the suit properties. The first prayer in their plaint in ELC NO.233 OF 2017 is for a permanent injunction to restrain the respondent from disposing of the suit properties or dealing with them in any manner detrimental to the appellants.

22. The 4<sup>th</sup> explanation to *section 7* of the *Civil Procedure Act* is explicit that:

**“Any matter which might and ought to have been made a 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.”**

23. The issues raised in ELC No. 233 of 2017 were not new, nor were they issues that could not have been raised in the previous suits. They ought to have been raised in the earlier proceedings between the parties. The appellants cannot be permitted to litigate in instalments.

24. For these reasons, we find and hold, like the learned trial judge, that ELC No.233 of 2017 at Malindi was *res judicata* by dint of the earlier determinations made in ELC No. 39 of 2014 and Civil Appeal No. 44 of 2014. Consequently, we dismiss this appeal with costs to the respondent.

**Dated and delivered at Nairobi this 20<sup>th</sup> day of November, 2020.**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb.**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**



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