THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 23 OF 2005

BETWEEN

MANIRAGUHA GASHUMBA :::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

SAM NKUNDIYE :: RESPONDENT

CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA

HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

HON. JUSTICE PROF.LILLIAN E.TIBATEMWA, JA

JUDGMENT OF THE COURT

This is a second appeal arising from the judgment of Hon. Justice J.B. Katutsi *vide* High Court of Uganda at Kabale, **Civil Appeal No. MKA 20 of 1984**. The judgment was delivered on 12th May 2004.

This appeal has a long and checkered history. The facts giving rise to this second appeal as we understood them are as follows;

In 1981 one Erinesta Kashumba also known as Gashumba sued one Kosia Nkundiye for trespass and general damages in respect of land situate at Kabira, Rugarama, Ndorwa, Kabale District. This was **Civil Suit No. 50 of 1981**, at Kabale Chief Magistrate's Court. In that suit Gashumba the plaintiff's claim was that her mother had in 1933 acquired the suit land from the Church Mission in Uganda, and that he inherited it in 1975 when she died.

He occupied and utilized the said land until 1980 when Nkundiye the defendant in that suit trespassed on it, by cultivating thereon.

The defendant in that suit on the other hand contended that he was the lawful owner of the same piece of land having acquired it from the *Muluka Chief* of the area. He contended that plaintiff's mother only came to live on the suit land upon the defendant's invitation, because she had been chased away from the Church land where she had been living with the plaintiff.

Apparently the defendant in that suit had married the plaintiff's sister. It was his contention that he invited his mother-in-law to

live with him and his wife on the suit land on compassionate grounds.

When the suit came up for hearing at the Magistrate's Court, an interesting issue arose. It was contended by the plaintiff that in 1965 he had litigated with the defendant over the same land and judgment had been given in his favour by a Magistrate's Court in Kabale in **Civil Suit No. 53 of 1965.**

The Grade One Magistrate who heard the suit found for the plaintiff and judgment was given in his favour.

The defendant appealed to the High Court at Kabale. Hon Justice Katutsi (J) allowed the appeal and set aside the judgment of the Magistrate, on 12th May 2004.

By this time the original parties to the suit had both died. The Administrators of the respective estates continued with the appeal, Sam Nkundiye and Gashumba Maniraguha the parties to this appeal.

It appears that both parties have remained on the same land or at least have continued to lay claim on it, hence this appeal.

This being a second appeal, this Court is not required to re-evaluate the evidence. That is a duty of the first appellate court, which must review the evidence and consider the materials before the trial

court. See **Pandya versus R [1957] EA 336 and Okeno versus Republic [1972] EA 32**.

Even where the trial court has erred the appellant court will only interfere where the error has occasioned a miscarriage of justice.

The second appellant court has no duty to re-evaluate the evidence of the trial court but will consider the facts of the appeal to the extent of considering the relevant point of law or mixed law and fact as raised in the second appeal. It may only interfere with the conclusion of the first appellant court, if that court misapplied or failed to apply the principles set out in **Pandya versus R (Supra), Kairu vs Uganda (1978) HCB 123 and S.M Ruwale Vs R [1957] EA 570**. The above was the gist of the holding of the **Supreme Court in Kifamunte Henry versus Uganda (Supreme Court Criminal Appeal No. 10 of 1997**).

The reading of **Rule 30(1)** of the rules of this Court clearly indicates that the duty of this Court to re-evaluate evidence is limited to first appeal.

It stipulates as follows:-

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"30 (1) on any appeal from a decision of High Court in <u>exercise of its original jurisdiction,</u>

The Court may

(a) Re-appraise the evidence and draw

10 ***inferences of fact....."***

Suffice it to say, therefore, that this court will limit itself to its role as a second appellant court, as this matter does not arise from a decision of the High Court exercising its original jurisdiction.

In his memorandum of appeal the appellant sets out the following

15 grounds:-

1) Having found that the parties had litigated over the subject matter in Civil Suit No. 53 of 1965 the learned judge erred in law in not

considering the binding nature of the judgment over the parties in the said litigation.

2) ***The learned trial judge erred in law in not considering the effect of the testimony of PW2.***

3) ***The learned trial judge erred in law to rely on minor inconsistencies in the appellant's case****.*

At the hearing of this appeal Mr. Edgar Tabaro together with Mr. Edwin Tabaro appeared for the appellant while Ms. Ann Karungi appeared for the respondent.

Both counsel applied to file written submissions, and the court granted them leave to do so.

The appellant in his written submissions set out 3 issues for determination by this court. Although it appears that the parties held a scheduling conference we were unable to find on record a joint scheduling memorandum. The issues set by the appellant in his written submissions slightly differ from the grounds of appeal as set out in the memorandum of appeal. The substance however, remains the same. In absence of a joint scheduling memorandum we shall proceed to determine this appeal on the grounds set out

in the memorandum of appeal already set out above in this judgment.

Ground One:

"Having found that the parties had litigated over the subject matter in Civil Suit No. 53 of 1965 the learned judge erred in law in not considering the binding nature of the judgment over the parties in the said litigation".

Counsel for the appellant in their written submissions faltered the learned trial judge for holding that the appellant then respondent had waived his right to the plea of *res- judicata*, having held that indeed the parties had in 1965 litigated over the same subject matter. They argued that the law does not provide for a waiver of *res-judicata*, which is a statutory provision set out in mandatory terms under **Section 7** of the **Civil Procedure Act. (Cap 75)**.

They argued that a right to the plea of *res-judicata* cannot be waived in any way and that a decision made by a competent court cannot be challenged or altered in any subsequent suit even if the same parties are litigating.

Section 76 of the **Civil Procedure Act** stipules as follows:-

> "*No court shall try any suit or issue in which the matter is directly and substantially in issue in a former suit between the same parties or parties under which they claim, litigating under the same title, in a Court of competent jurisdiction try the subsequent or the suit in which the issue has been subsequently raised and has been heard and finally decided by that Court*"

We agree with counsel for the appellant that this provision of the law cannot be waived by parties. It is a law that prohibits courts from trying matters that had already been finally determined.

The Court of Appeal of Uganda in **Ponsiano Semakula versus Susane Magala & Others, 1993 KALR P.213** had this to say on the doctrine of *res-judicata*.

*"The doctrine of res-judicata, embodied in **S.7 of the Civil Procedure Act**, is a fundament doctrine of all courts that there must be an end of litigation. The spirit of the doctrine succinctly expressed in the well-know maxim: '**nemo debt bis vexari pro una et eada causa**' (No one should be vexed twice for the same cause).Justice requires that every matter should be once*

*fairly tried and having been tried once, all litigation about it should be concluded forever between the parties. The test whether or not a suit is barred by **res-judicata** appears to be that the plaintiff in the second suit trying to bring before the court in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of **res-judicata** applied not only to points upon which the first court was actually required to adjudicate but to every point which properly belongs to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time".*

We agree with above proposition of the law.

In respect of this issue, the learned judge states as follows at page 3 of his judgment.

> ***"It is trite that a plea of <u>res-judicata</u> is not one of jurisdiction of the court but one which a party can waive"***

With respect, we do not agree.

In fact *res judicata* is a plea of jurisdiction, in that **Section 7** of **Civil Procedure Act (supra)** barres any court from trying a suit or even an issue that is *res judicata*.

It would be correct therefore to state that courts have no jurisdiction to try a matter that is *res judicata*.

The learned judge therefore erred when he held that a plea of *res-judicata* had been waived by the defendant at the trial before the Magistrate's Court.

The issue still remains as to whether or not at the institution of **Kabale Magistrates Court Civil Suit No. 50 of 1981**, the

subject matter of that suit was *res-judicata*, the dispute between the parties having been exhaustively and finally determined in **Civil Suit No. 53 of 1965**.

It was submitted by the appellant that by the time **Civil Suit No. 50 of 1981** was instituted the dispute between the parties was already *res-judicata.*

It was further submitted that courts should take judicial notice of the turbulent times this country went through where loss of files in government offices was common practice as a result of looting or violence for which reason judgments and files were unable to be found.

We do not agree that courts of law in this country should take judicial notice of loss of files. In any civil matter wherever a court file is lost or misplaced a duplicate file can always be opened as parties to the suit always have copies all the relevant court documents. In this particular case a typed but unsigned judgment was in fact produced in court by the parties. The parties therefore could have sought and obtained a signed and certified copy of the

judgment at the time it was delivered or so soon thereafter if they sought to rely on it in future.

We agree with the submissions for learned counsel for the respondent that a judgment must be signed and dated by a judge or Magistrate who wrote it at the time of pronouncing it. A judgment that is not signed and dated in accordance with **Order 21 rule 3(1)** of the **Civil Procedure Rules** is no judgment at all and is therefore invalid. We agree with learned counsel for the respondent that neither oral evidence of the Judicial Officer who wrote it nor certification could validate such an unsigned judgment.

We find that if the trial judge had properly re-evaluated the evidence he would have found that the trial magistrate had erred in admitting an unsigned and uncertified document purporting to be a valid judgment of court.

He would have further found that *res-judicata* could not be proved by oral evidence.

We agree with the decision of this court cited by learned counsel for the appellant, **Ponsiano Semakula Vs Sasare Magala &**

Others (supra), which is to the effect that the court before which the issue of *res- judicata* is raised must peruse the judgment of the court in the first suit and ascertain that the judgment exhaustively dealt with the issues raised in that case and if possible the court should peruse the whole court record so that it gets the opportunity to appraise itself of all matters raised in the earlier suit in order to decide whether the plea of *res-judicata* succeeds or not.

This court went on to hold in the above appeal that a court before which a plea of *res-judicata* is raised may rely on a judgment of the first court if it is produced without objection.

In our view the plea of *res-judicata* can only be supported by production of a valid judgment of first court and not by oral evidence.

On this issue Court of Appeal in the **Ponsiyano Semakula case (supra)** following the decision of **The Privy Council Kali Krishna versus Secretary of State 16 Cal 173** had this to say:-

"The Privy Council ruled there that to apply the law of estoppels by judgment, the judgment must be looked at; the decree is usually insufficient for showing what had been heard and finally decided. In subsequent decisions the Indian Courts held that the scope of the former litigation and the question raised and decided therein must be determined by reference not merely to the decree, but also the judgment, and if need be, to the pleadings. One such decision is ***Ranjit Singh Vs Basanta Kamau 12 C.W.N. 739; C.L.J 597****. The Indian authorities are*

in conformity with English law on this matter, as stated in Halsbury's Laws of England (3rd Edition) para.388:

> *"In order to ascertain what was in issue between the parties in the earlier proceedings, the judgment itself must of course be looked at and the verdict, if any, on which it is founded; and where there have been pleadings, these should also be examined being in fact part of the record."*

We have already found that there was no valid judgment in this case. The plea *Res-judicata* could therefore not been sustained in

absence of a valid judgment, or decree or pleadings and proceedings of the first Court.

We find that no basis upon which a plea of *res-judicata* could be sustained, and we hold so.

Be that as it may, the Kabale Magistrates Court **Civil Suit No. 50 of 1981** from which this second appeal emanates was an action based on trespass. Each action of trespass constitutes a fresh and distinct cause of action. It is inconceivable that an action based on trespass committed in 1980 and the subject of a 1981 suit could have been *res judicata* simply because the same parties litigated over the same matter in 1965.

Again trespass may also be a continuing tort on part of a defendant. The learned authors **Winfield and Folowicz** put it as follows:-

> *"Trespass, whether by way of personal entry or by placing things on the plaintiff's land may be 'continuing' and give rise to actions* ***de die in diem*** *so long as it lasts. In* ***Holmes versus Wilson****,* ***(1839) 10 A & E 503****, Highway Authorities supported a road by wrongfully buttresses on the plaintiff's*

*land, and they paid full compensation in an action for trespass. They were nevertheless held liable in a further action for trespass, because they had not removed the buttresses. Nor does a transfer of the land by the injured party prevent the transferee from suing the defendant for continuing trespass". **(Winfield and Jolowicz on TORT 11th Edition, Sweet & Maxwell London 1979)Page 342**.*

In cases of continuing trespass *res-judicata* does not apply. Even limitation would not bar an action based on continued trespass.

We find that the learned trial Magistrate was correct when he conducted a full trial on the issue of ownership of the land, effectively disregarding the issue of *res-judicata*.

However, we do not agree with his Judgment and his reasoning for the reasons already set out in this Judgment.

Ground One of the appeal therefore partly succeeds but for different reasons from those given by the learned Judge of the High Court. We agree for different reasons set out earlier in this

judgment that **Kabale Chief Magistrate Court Civil Suit No. 50 of 1981** was not barred by *res-judicata*.

Ground 2

The learned trial Judge erred in not considering the effect of the testimony of PW2.

PW2 was said to be the Magistrate who heard and determined the dispute between the parties in the 1965 suit.

We have already held that his testimony could not prove that the matter was *res-judicata* in absence of a duly signed Judgment of the Court.

His evidence therefore had no effect on determining the issue of ownership of the land or indeed the issue of *res-judicata*.

This ground also fails and is accordingly dismissed.

Ground 3:

The learned trial judge erred in law to rely on minor inconsistencies in the appellants' case.

We have already stated earlier in this judgment that as a second appellant court, this court is not required to re-evaluate the evidence unless the first appellant court fails to do so.

We have found no reason to falter the Learned Judge in his re-evaluation of evidence as it relates to the ownership of the land. The learned trial judge found that there was sufficient evidence to prove that suit land belonged to Nkundiye the respondent herein. He believed his testimony and rejected that of the appellant herein.

We have found no reason to interfere with his findings and conclusions on the issues of fact and we uphold them.

We shall therefore not interfere with his judgment in that regard.

Accordingly this Ground also fails.

Although this appeal has succeeded on some aspects of the law it substantially fails and is accordingly dismissed.

We order that the appellant pays two third of the costs in this Court and in the courts below.

Dated at Kampala this....**21st** .... day of....**February**.... **2014**

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HON. KENNETH KAKURU

JUSTICE OF APPEAL.

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HON. GEOFFREY KIRYABWIRE

JUSTICE OF APPEAL.

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HON. PROF. LILLIAN E. TIBATEMWA

JUSTICE OF APPEAL.