

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Egonda-Ntende, Musota, JJA & Kasule, Ag. JA]

CIVIL APPEAL NO. 115 OF 2017

(Arising from High Court Civil Suit No. 410 of 2013)

BETWEEN

Angelica Elsauko=====Appellant No. 1

Ajarova Lilly=====Appellant No.2

AND

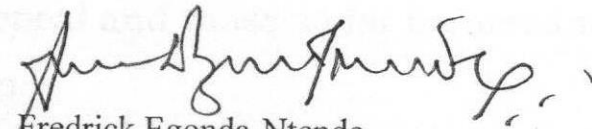
Attorney General=====Respondent

*(On appeal from a ruling of the High Court of Uganda (Namundi, J.) delivered
on the 4th May 2017)*

Judgment of Fredrick Egonda-Ntende, JA

- [1] I have had the benefit of reading in draft the judgment of my brother, Musota, JA. I agree with his conclusion that this matter was not *res judicata* for the reasons that he has set out.
- [2] As Kasule, Ag. JA, agrees, this appeal is allowed with costs. The ruling of the High Court is set aside. The matter is remitted to the High Court for trial. Costs below will abide the outcome of that trial.

Signed, dated and delivered at Kampala this 10th day of Aug 2020


Fredrick Egonda-Ntende
Justice of Appeal

THE REPUBLIC OF UGANDA

In the Court of Appeal of Uganda

At Kampala

Civil Appeal No. 115 of 2017

(Arising from Civil Suit No. 410 of 2013)

1. Angelica Elsauko

2. Ajarova Lilly

..... Appellants

Versus

The Attorney General Respondent

Coram: Hon. Justice F.M.S. Egonda-Ntende, JA

Hon. Justice Stephen Musota, JA

Hon. Justice Remmy Kasule, Ag. JA

Judgement of Hon. Justice Remmy Kasule, Ag. JA

I have had the advantage of reading the Judgment of My Lord Hon. Justice Stephen Musota, JA, whereby he allows the appeal.

I agree with the reasoning and conclusion by His Lordship Stephen Musota, JA, that the learned High Court trial Judge was in error to hold that High Court Civil Suit No. 410 of 2013 was res judicata, and by reason thereof, to dismiss the said suit.

I am also in agreement with the orders proposed by His Lordship.

I award costs of the appeal and those so far incurred in the Court below to the appellants.

Dated at Kampala this ^{10th}..... Day of ^{Aug}..... 2020.



Remmy Kasule
Ag. Justice of Appeal

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 115 OF 2017

(Arising from Civil Suit No. 410 of 2013)

5 **1. ANGELICA ELSAUKO**
 2. AJAROVA LILLY ::::::::::::::::::::::::::::::::::::::: APPELLANTS

VERSUS

ATTORNEY GENERAL ::::::::::::::::::::::::::::::::::::::: RESPONDENT

10 **CORAM: HON. JUSTICE F. M. S EGONDA NTENDE, JA**
 HON. JUSTICE STEPHEN MUSOTA, JA
 HON JUSTICE REMMY KASULE, Ag. JA

JUDGMENT OF JUSTICE STEPHEN MUSOTA, JA

15 This appeal arises out of the ruling and orders of Hon. Justice Godfrey Namundi in which he dismissed Civil Suit No. 410 of 2013 on grounds that it was *res judicata*.

The appellants were dissatisfied with the decision of the trial judge and filed this appeal on the following grounds;

- 20 1. The learned Judge erred in law and fact when he dismissed Civil Suit No. 410 of 2013 on the ground that it was *res judicata*.
 2. The learned trial Judge erred in law and fact when he held that Civil Suit No. 410 of 2013 has no merit before hearing the evidence.

25 **Background**

The appellants were tenants on the suit land comprised in Plots 1 and 2 Nakasamba close Entebbe Municipality being houses controlled by Ministry of Agriculture Animal Industries and Fisheries.

5 The said houses were advertised for sale in the year 2008 to the sitting tenants and the appellants applied to buy as sitting tenants. On 3rd December, 2009, the appellants were rejected by the pool houses committee on the grounds that they were not civil servants. The pool house committee allocated plot 1 (house No. 5) Nakasamba close, in occupation of 1st Appellant, to Komayobi Bulegeya while plot
10 No. 3 (house No. 3) Nakasamba close, in occupation of the 2nd appellant, was allocated to J. V. F Musoke Kibuuka.

The appellants filed Civil Suit No. 410 of 2013 against the respondent seeking, among other orders, a declaratory order, that they are lawful occupants/sitting tenants and were statutorily entitled to be given
15 the first option to purchase the respective houses. When the suit came up for hearing, the respondents raised a point of law, that the suit was *res judicata* having been adjudicated upon and determined in High Court Misc. Cause No. 78 of 2009.

Representation

20 At the hearing of the appeal, Mr. Kavuma Isa and Mr. Segamwenge Hudson appeared for the appellants while Ms. Nabakooza Margaret appeared for the respondent.

Submissions of the appellant

25 Counsel for the appellants argued grounds 1 and 2 together and argued that the suit was not *res judicata* basing on the law governing *res judicata*. Counsel relied on section 7 of the Civil Procedure Act and the Supreme Court decision in **Mansukhlai Ramji Karia and another Vs Attorney General and 2 others S.C.C.A No. 20 of 2002** which stated the minimum conditions in *res judicata*. These include;
30 that there was a former suit or issue decided by a competent court; the matter in dispute in the former suit between the parties must

have also been directly or substantially in dispute between the parties under the same title; the parties in a former suit should be the same parties litigating under the same title.

5 Counsel argued that the parties in Misc. Cause No. 78 of 2009 were Peter Apell, Ajovora Lilly, Gama Hassan, Angelica Elsauko, Thomas Gossen and Gerum Tekle against the Permanent Secretary Ministry of Lands, Housing and Urban Development. In Civil Suit No. 410 of 2013, the parties were Angelica Elsauko and Ajorova Lily Vs Attorney General. The parties in both suits are not the same and as such, the
10 doctrine of *res judicata* does not arise. In addition, Misc. Cause No. 78 of 2009 was filed against a wrong party and the trial Judge held that it was against a respondent who is a nonperson.

Counsel relied on **Maniraguha Gashumba Vs Sam Nkundiye C.A.C.A No. 23 of 2005** in which a plea of *res judicata* failed because
15 the former judgment in the former suit was not signed and dated even though the parties were the same. In the instant case, the Ruling in Misc. Cause No. 78 of 2009 was reached with not only a wrong party but also a non existing legal entity and therefore null and void. The issues and substance in both cases differ. Misc. cause No. 78 of 2009
20 was an application for an order of certiorari quashing the decision of the government pool houses sale committee declaring the applicants not eligible to purchase the houses in question. However Civil Suit No. 410 of 2013 was concerned with the merit of the appellant's claim as to whether they were statutorily entitled to the first option to
25 purchase as lawful occupants or sitting tenants.

Submissions of the respondent

Counsel submitted that in Misc. Cause No. 78 of 2009, the trial Judge did not find any merit in the applicant's case and the
30 application was dismissed. The 1st and 2nd plaintiff then brought Civil Suit No. 410 of 2013 on substantially the same facts and issues as

5 raised and resolved by the court in the aforementioned Misc. Cause. He rightly observed the issues raised by the plaintiffs in the plaint were clearly resolved by the court. The learned trial Judge, upon perusal of the court ruling in Misc. Cause No. 78 of 2009 together
10 with the facts constituting the cause of action in Civil Suit No. 410 of 2013, rightly found that the trial Judge in Misc. Cause No. 78 of 2009 exhaustively dealt with the issues that had been raised in Civil Suit No. 410 of 2013. The learned trial Judge's finding in which he dismissed Civil Suit No. 410 of 2013 on grounds of *res judicata* was rightly arrived at.

Court's consideration of the appeal

I have carefully considered the submissions of both counsel and read the record and the authorities cited to us.

15 As a first appellate court, I have a duty to re-appraise the evidence and make inferences, on both issues of fact and law under Rule 30 of the Rules of this Court. The duty of the first appellate court to re-appraise the evidence has long been established. A number of authorities in this court and in the Supreme Court have laid down this duty. Mulenga JSC. in ***FR. Narsensio Begumisa and others***
20 ***versus Eric Tibebaga (Supreme Court Civil Appeal No. 17 of 2002)*** (unreported) reiterated the above principle in the following words:-

25 *"It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it*

has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.

See also **Bogere Moses vs Uganda (Supreme Court Criminal Appeal No. 1997)** and **Kifamunte Henry vs Uganda (Supreme Court Criminal Appeal No. 10 of 1997)**.

From the evidence on record, the trial Judge found that Civil Suit No. 410 of 2013 was *res judicata* for having been extensively resolved in Misc. Cause No. 78 of 2009. The issue for this court to resolve is whether Civil Suit No. 410 of 2013 was *res judicata*.

10 The principle of *res judicata* is provided for under **Section 7** of the **Civil Procedure Act** thus;

“7. *Res judicata*.

15 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 the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court.”

20 This court in **Ponsiano Semakula versus Susane Magala & Others, 1993 KALR P.213** had this to say on the doctrine of *res-judicata*.

25 “The doctrine of *res-judicata*, embodied in **S.7 of the Civil Procedure Act**, is a fundamental doctrine of all courts that there must be an end of litigation. The spirit of the doctrine succinctly expressed in the well-known maxim: ‘**nemo debet 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 is 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”.

10 I have had the benefit of reading the Ruling by Hon. Justice V. F Kibuuka Musoke in Misc. Cause No. 78 of 2009 and the Ruling in the preliminary point of law raised in Civil Suit No. 410 of 2013. In Misc. Cause No. 78 of 2009, the application was for judicial review of the decision of the Pool Houses Sales Committee which decided, that
15 the appellants were not qualified to purchase the houses, because they were not civil servants and as such, fell outside the scope of the Government policy of Divestiture of Government Pool/Institutional houses. Misc. Application No. 78 of 2009 was filed against the Permanent Secretary Ministry of Lands, Housing and Urban
20 Development, who is a non-existing legal entity.

The grounds for judicial review were that the applicants were not given an opportunity to be heard and for that reason, the decision of the Pool Houses Sales Committee was made contrary to the Principles of natural justice; the termination of the tenancies of the applicants
25 by the Permanent Secretary Ministry of Lands, Housing and Urban Development was wrongful in that the respondent was neither the landlord not the person authorized under the law to terminate the tenancies; the requisite 1 year’s notice for termination was not given to the applicants and the properties from which the directive was
30 made were not liable to be sold under the scheme of the Divestiture of Government pool, but under the provisions of the Public Procurement and Disposal of Public Assets Act 2003.

The Judge found that there was injustice, error of law or unfairness emanating from the decision of the Pool Houses Sale Committee and that the decision was purely administrative.

5 Civil Suit No. 410 of 2013, was brought against the Attorney General and the 1st plaintiff challenged the allocation of the property comprised in LRV 4125 Folio 12 Plot 1 at Namusamba Entebbe to one Komayombi Bulegeya. The claim was based on the fact that they were in occupation and possession of the suit property as sitting tenants and government should have given them the first offer to
10 purchase the suit properties. A preliminary point of law was raised that the suit was *res judicata* having been handled in Misc. Cause No. 78 of 2009 which the trial Judge upheld.

Whereas Civil Suit No. 410 of 2013 was brought on the same facts and issues as those in Misc. Cause No. 78 of 2009, Misc. Cause No.
15 78 was brought against the Permanent Secretary Ministry of Lands, Housing and Urban Development while Civil Suit No. 410 of 2013 was filed against the Attorney General. For the doctrine of *res judicata* to apply, the suit must have been adjudicated upon by a court of competent jurisdiction between the same parties and the same
20 subject matter.

The principle of *res judicata* according to **Halsbury's Laws of England, Volume 12 (2009) 5th Edition, Para** states that;

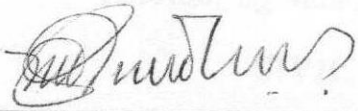
25 *"The law discourages re-litigation of the same issues except by means of an appeal. It is not in the interest of justice that there should be re-trial of a case which has already been decided by another court, leading to the possibility of conflicting judicial decisions, or that there should be collateral challenges to judicial decisions; there is a danger not only of unfairness to the parties concerned, but also of bringing the administration of justice into
30 disrepute"*

Civil Suit No. 410 of 2013 and Misc. Cause No. 78 of 2009 were not between the same parties and as such, the doctrine of *res judicata* did not apply. Secondly, the decision with regard to the judicial review application having been against a non-existing party, could not create a *res judicata* decision as no decision on the merits of the claim could be said to have been made. The application for judicial review was incompetent for not proceeding against a known person. To compound it all, there is a troubling matter. The learned Judge who entertained and determined the High Court Miscellaneous Cause No. 78 Of 2009 on 21.09. 2009 seems to have been a beneficiary of the sale of one of the houses in issue as one of those houses is alleged to have been allocated to said learned Judge on 03.12.2009 according to paragraph 4(g) (ii) of the amended plaint in HCCS No. 410 of 2013 only a few months after rendering the Ruling in High Court Miscellaneous Cause No. 78 of 2009. This raises the issue of conflict of interest and thus the possibility that by reason thereof the decision of the learned Judge might have been a nullity by reason thereof. A full trial to resolve this issue, and others, is necessary so as to do justice to all the parties concerned.

With due respect, I find, that the learned trial Judge misdirected himself when he dismissed Civil Suit No. 410 of 2013 on a preliminary objection of it being *res judicata*. This appeal is therefore allowed with the following orders;

1. The ruling and orders of the High Court in Civil Suit No 410 of 2013 are hereby set aside.
2. The Registrar of the High Court is directed to fix Civil Suit No. 410 of 2013 for hearing on merit in the next convenient session.
3. The appellant is granted costs of this appeal

Dated this 10th day of Aug 2020



5 **Stephen Musota, JA**