



THE REPUBLIC OF UGANDA

**THE COURT OF APPEAL OF UGANDA
AT KAMPALA**

CORAM: MADRAMA, MULYAGONJA AND MUGENYI, JJA

CIVIL APPEAL NO. 64 OF 2016

BETWEEN

MUSISI KONDE APPELLANT

AND

LUSWATA KANAKULYA RESPONDENT

**(Appeal from the Judgment of the High Court of Uganda at Jinja (Basaza Wasswa, J)
in Civil Appeal No. 57 of 2013)**

JUDGMENT OF MONICA K. MUGENYI, JA

A. Introduction

1. Mr. Musisi Konde ('the Appellant'), as co-administrator of the Estate of Abdukeeri Ssali (deceased), instituted **Civil Suit No. 6 of 2009** in the Chief Magistrates Court of Mukono for the recovery of the two bibanjas comprised in Block 162 Plots 65 and 66 from Mr. Rashid Luswata Kanakulya ('the Respondent'). In his view, the two properties formed part of the deceased's Estate. However, with the leave of the court, the Plaintiff was subsequently amended to exclude Plot 65. The suit was determined in favour of the Appellant, the trial magistrate *inter alia* finding that a certificate of title in respect of a kibanja held by the Respondent had been acquired fraudulently and should be cancelled.
2. The Respondent successfully appealed that decision before the High Court of Uganda seated at Jinja vide **Civil Appeal No. 144 of 2012**. In its decision (which has since been confirmed by this Court in **Civil Appeal No. 171 of 2015**), the High Court sitting as a first appellate court faulted the Magistrates Court for its finding of fraud against the Respondent in the absence of any pleading or proof thereof.
3. Meanwhile, the Appellant had also lodged **Civil Suit No. 57 of 2013** in the High Court at Jinja ('the trial court') seeking the cancellation of the certificate of title in respect of the land comprised in Kyaggwe Block 162 Plot 65 on allegations of fraud. The Respondent contended that the matter was *res judicata*, having been supposedly determined by the Chief Magistrates Court of Mukono in **Civil Suit No. 6 of 2009** and settled on appeal to the High Court vide **Civil Appeal No. 144 of 2012**.
4. The trial court agreed that the matter was *res judicata* and accordingly dismissed the suit, hence the present Appeal. The Appellant proffered the following grounds of appeal:
 - I. The learned Judge erred in law and fact when she sustained the preliminary objection on *res judicata* at the trial thereby coming to an erroneous decision.
 - II. The learned Judge erred in law and fact when she dismissed the suit for being *res judicata* thereby occasioning a miscarriage of justice to the appellant.

5. The Appellant was represented at the hearing by Messrs. Jonathan Kiryowa and Muhammed Kikomeko, while the Respondent was self-represented. Both parties relied upon written submissions filed in the matter.

B. Determination

6. Learned Counsel for the Appellant argued both grounds of appeal together. For parity the same approach is adopted in this judgment, particularly given that both grounds essentially amount to the same thing. Counsel relied upon section 7 of the Civil Procedure Act (CPA) and the case of **Boutique Shazim Ltd Vs Norratam Bhatia and Hemantini Bhatia Civil Appeal No. 36 of 2007** to argue that the trial court wrongly imputed *res judicata* to the circumstances of the present case. Section 7 of the CPA provides as follows:

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.

7. Meanwhile, on the authority of **Boutique Shazim Ltd Vs Norratam Bhatia and Hemantini Bhatia** (supra), it is argued that *res judicata* would only arise where:

- (1) The matter was in issue in a former suit.
- (2) The parties were claiming or litigating under the same title in the former suit.
- (3) The matter had been heard and disposed of by a court of competent jurisdiction.

8. In this case, whereas it is conceded that the latter case involved the same parties as the former one, and they were indeed claiming under the same title; it is proposed that the previous suits raised entirely different issues. It is the Appellant's contention that the cause of action in **Civil Suit No. 6 of 2009** was the allegedly unlawful grabbing of land comprised in Block 162 Plot 65 and 66 at Lugazi, the said suit seeking to resolve the question as to how the Respondent took possession of the land in contention without the consent of the administrators of the deceased's Estate. In his view, the question of fraud

did not arise in that suit, having neither been pleaded nor proved, but it was specifically in issue in the latter suit (Civil Suit No. 57 of 2013) where the appellant sought the cancellation of the certificate of title in respect of land comprised in Plot 65 Block 162 at Kyaggwe on account of its having been procured fraudulently. Learned Counsel faulted the trial court for disregarding the fact that all matters to do with the fraudulent acquisition and registration of the land comprised in Block 162 Plot 65 had been withdrawn at the onset of the hearing of Civil Suit No. 6 of 2009, which fact is reflected in Civil Appeal No. 144 of 2012. He urged the Court to consider the oral amendment of the plaint in Civil Suit No. 6 of 2009 that is to that effect.

9. Conversely, the Respondent supported the findings of the trial court, arguing that they were grounded in the law and evidence on record. He contested the proposition that the Appellant had amended the plaint as alleged, maintaining that the matters allegedly withdrawn by the amendment remained directly and substantially in issue in both Civil Suit No. 6 of 2009 and Civil Suit No. 57 of 2013, from which the present Appeal arises. He argued that throughout the trial both parties had used them in support of their respective cases.
10. It is trite law that a first appeal is in the nature of a retrial, the court being under a duty to re-evaluate the material on record and arrive at its own independent conclusion. See Selle Vs Associated Motor Boat Co. (1968) EA 123 and J. Muluta v S. Katama Civil Appeal No.11 of 1999 (Supreme Court). It is on that premise that I carefully re-evaluated the material on record in this matter. I have also considered the provisions of section 7 of the CPA on the plea of res judicata. That provision categorically forbids the retrial by courts of any dispute in which the matter directly and/ or substantially in issue has been directly and/ or substantially in issue in a former suit between the same parties and finally determined by a competent court. That legal provision was construed in Mansuklal Ramji Karia & Another v Attorney General & Others (2005) 1 EA 83 at 93 (Supreme Court, Uganda) as follows:

The provision indicates that the following broad minimum requirements have to be satisfied:

- (a) There has to be a former suit or issue (finally) decided by a competent court.

- (b) The matter in dispute in the former suit between the parties must also be directly or substantially in dispute between the parties in the (latter) suit where the doctrine is pleaded as a bar.
- (c) The parties in the former suit should be the same parties under whom they or any of them claim, litigating under the same title.¹

11. It is common ground herein that the parties in **Civil Suit No. 6 of 2009** (the former case) are directly the same as those in **Civil Suit No. 57 of 2013** (the latter case). It was also conceded that the parties in both suits were claiming under the same title. What remains in contention is whether the matter in dispute between the parties was the same in both suits and, if so, whether it was finally determined by a competent court. The trial court did in the following terms adjudge the latter suit to have been *res judicata*:

From the contentions of the Parties and the judgment of the lower court in the former suit, there is no doubt in my mind that the Defendant's ownership of the suit land which the Plaintiff now seeks to challenge in the present suit, was indeed a subject of litigation in the former suit. Ownership of the suit land was a ground of defence in the former suit within the ambit of Explanation 4 of Section 7 of the CPA, and was indeed a matter directly and substantially in issue in that former suit that was heard and decided upon.

12. With respect, I think the learned trial judge erred in finding that the Respondent's ownership of the suit land in the latter case was a subject of litigation in the former suit. That finding is not borne out by the record of proceedings in the former suit. As garnered from the plaint in the former suit, the Appellant initially lodged a suit challenging the Respondent's occupation of land comprised in two plots – plots 65 and 66 of Block 162. However, the record of proceedings in that (former) suit reveals that the plaint had on 18th May 2009 been amended to exclude the land comprised in plot 65 from contention. The net effect of that amendment to the plaint was to leave only the parcels of land comprised in Block 162 plot 66 in contention in the former suit, while the latter suit sought to interrogate the Respondent's ownership of Block 162 plot 65. Undoubtedly, therefore, the subject of litigation in the two suits was at variance and the plea of *res judicata* was unsustainable.

¹ See also **Lotta v Tanaki & Others (2003) 2 EA 556 at 557** (Court of Appeal, Tanzania)

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13. Relatedly, the trial court's application of Explanation 4 to section 7 of the CPA would appear to be similarly untenable. That provision states as follows:

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

14. It thus behoves the Court to determine whether the matters raised in Civil Suit No. 57 of 2013 (the latter case) *might and ought* to have been raised and/ or retained in that former suit. If the answer to that question is in the affirmative, the Court would be enjoined by *Explanation 4* to adjudge those matters as having been directly and substantially in issue in that suit and they would, to that extent, offend the doctrine of *res judicata*.

15. The material on record is that the former suit essentially represented a cause of action in trespass to land while the latter suit raises the question of fraud. At the heart of both suits are purported land sale transactions between the Respondent, the deceased and the deceased's relatives in respect of two adjacent plots of land as described above. The evidence on record in the former suit is that the Respondent bought the deceased's mailo interest in plot 65 directly from him, while he purchased 5 pieces of land on plot 66 from the deceased's relatives, including his wife (PW2) and sons (DW2 and DW3). In fact, some of those pieces of land were purchased from the deceased's relatives after his death. The two plots of land were therefore purchased under separate sale transactions. Whereas the sale transactions in respect of the pieces of land comprised in plot 66 remained in contention in the former suit, the Respondent's ownership of plot 65 was contested under the latter suit.

16. The reason advanced for the removal of plot 65 from contention in the former suit was that since the Respondent had a certificate of title in respect thereof a cancellation of the title would be sought in the High Court. This amendment would appear to have been quite correctly informed by the restriction in section 177 of the Registration of Titles Act, Cap 230 (RTA) for cancellations of certificates of title to be the exclusive preserve of the High Court. It was also in tandem with the provisions of Order 2 rule 1 of the Civil Procedure Rules (CPR) that mandates a plaintiff to '**relinquish any portion of his or her claim in order to bring the suit within the jurisdiction of any court.**' For completeness, section 177 of the RTA is reproduced below.

Upon the recovery of any land, estate or interest by any proceeding from the person registered as proprietor thereof, the High Court may in any case in which the proceeding is not herein expressly barred, direct the registrar to cancel any certificate of title or instrument, or any entry or memorial in the Register Book relating to that land, estate or interest, and to substitute such certificate of title or entry as the circumstances of the case require; and the registrar shall give effect to that order.

17. To the extent that section 177 designates the mandate of cancellation of land titles to the High Court, it negates the jurisdiction of magistrates' courts for that purpose. Accordingly, it was imperative that the Appellant relinquishes his claim for the recovery of the Respondent's registered mailo interest in Block 162 plot 65 before the trial court in the former suit as an order of cancellation of the title would have been beyond that court's jurisdiction. On that premise, therefore, it cannot be suggested that the matters of cancellation of title that arose in Civil Suit No. 57 of 2013 (the latter case) *might and ought* to have been raised and/ or retained in the former suit. They thus were not directly and substantially in issue as envisaged under *Explanation 4* to section 7 of the CPA.

18. The test of *res judicata* was further addressed in the case of Karokora v Attorney General, Constitutional Petition No. 45 of 2012² where, re-echoing this Court's decision in Ponsiano Semakula v Susan Magala & Others (1993) KALR 213, it was observed:

Essentially the test to be applied by court when determining the question of *res judicata* is this: Is the plaintiff in the second or subsequent action trying to bring before the court in another way and in the form of a new cause of action, a matter which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon? If the answer is in the affirmative, 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 belonged to the subject matter of litigation and which the parties or their privies exercising reasonable diligence might have brought forward at the time. (*my emphasis*)

19. For present purposes, the import of the litigation in the former suit having been the recovery of land in the possession of the Respondent, the cancellation of the

² Also reported at (2014) UGCC 16

Respondent's certificate of title in the latter suit could not have been properly enjoined in that litigation as was contemplated in **Karokora v Attorney General** (supra) so as to support the defence of *res judicata*. In any event, the Respondent being a registered proprietor of the land in issue in the latter suit, a cause of action in trespass to land (such as accrued to the former suit) would have been untenable given that a certificate of title proffers conclusive legal title to property that can only be impeached on account of fraud. A registered proprietor of land thus cannot be deemed to be a trespasser on land that he enjoys legal proprietorship over.

20. In the result, I find that the trial court did err in deciding as it did that the defence of *res judicata* was sustainable in the present circumstances. Before I take leave of the Appeal, I am constrained to observe that where a trial court is faced with an issue as grave as the fraudulent acquisition of legal title to land and *res judicata* is pleaded as a defence, it would be the counsel of prudence that the issue is thoroughly interrogated. The circumstances under which the present Respondent came into registered proprietorship of the suit property in issue in the latter suit would undoubtedly be a question of evidence. The trial court would have done well to heed the approach advanced by the Supreme Court in **Mansuklal Ramji Karia & Another v Attorney General & Others** (supra), where it was opined (per Tsekooko, JSC):

Here the learned trial judge relied on the pleadings and submissions of counsel for both sides ... for his view that the suit was *res judicata*. ... In my opinion the proper practice normally is that where *res judicata* is pleaded as a defence, a trial court should, where the issue is contested, try that issue and receive some evidence to establish that the subject matter of the dispute between the parties has been litigated upon by the same parties, or parties through whom they claim.

C. **Conclusion**

21. The upshot of this decision is that I do allow this Appeal and hereby order that **Civil Suit No. 57 of 2013** be remitted back to the High Court for determination on its merits. The costs in this Court and the lower court shall abide the cause.

I would so order.

Dated and delivered at Kampala this^{24th} day of^{Jan}....., 2022.

Monica K. Mugenyi

Hon. Lady Justice Monica K. Mugenyi

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA,
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
(CORAM: MADRAMA, MULYAGONJA, MUGENYI, JJA)

CIVIL APPEAL NO 64 OF 2016

MUSISI KONDE} APPELLANT

VERSUS

LUSWATA KANAKULYA}RESPONDENT

*(Appeal from the Judgment of the High Court at Jinja (Basaza Wasswa, J)
In Civil Appeal No 57 of 2013)*

JUDGMENT OF CHRISTOPHER MADRAMA, JA

I have had the benefit of reading in draft the judgment of my learned sister Hon. Lady Justice Monica K. Mugenyi, JA.

I agree with her that the appeal be allowed for the reasons she set out in her judgment and have nothing useful to add. Since Hon. Lady Justice Irene Mulyagonja, JA also agrees, this appeal is allowed with the following orders:

1. The Judgement of the High Court in Civil Suit No 57 of 2013 is set aside.
2. Civil Suit No 57 of 2013 is remitted to the High Court for determination on merits.
3. Costs in this court and the lower court shall abide the outcome of the suit.

Dated at Kampala the 24th day of Jan 2022



Christopher Madrama Izama

Justice of Appeal

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
(Coram: Madrama, Mugenyi, Mulyagonja, JJA)

CIVIL APPEAL NO.64 OF 2016

BETWEEN

MUSISI KONDE:.....APPELLANT

AND

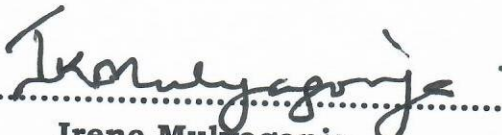
LUSWATA KANAKULYA:.....RESPONDENT

JUDGMENT OF IRENE MULYAGONJA, JA

I have had the benefit of reading in draft the judgment of my learned sister Hon. Lady. Justice Monica Mugenyi, JA.

I entirely agree with the reasoning and the final order that Civil Suit No. 57 of 2013 be remitted to High Court for determination on its merits with the orders as to costs that she has proposed.

Dated at Kampala this^{24th} day of ^{Jan}.....2022

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Irene Mulyagonja
Justice of Appeal/Constitutional Court