REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL APPEAL NO.27 OF 1998

(**Arising from civil suit no. 23 of 1994 before the Chief Magistrates Court of Luwero)**

FILIMON KAGGWA:: APPELLANT

VERSUS

LIVINGSTONE KATO ::RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

JUDGEMENT

1. The appellant, Filimon Kaggwa, was the unsuccessful party/defendant in the court below. The respondent, Livingstone Kato, was the successful/plaintiff in the court below. The appellant now appeals against the decision and order of the Chief Magistrate. The respondent supports the decision of the Chief Magistrate.

2. The appellant's first contention is that these proceedings were res judicata as they had been fully and effectually adjudicated upon in a previous suit between the same parties and over the same subject matter. As this is both a matter of law and goes to the issue of competency or jurisdiction of the trial court it will be dealt with first.

3. The point of commencement is the pleadings in the court below. The respondent/plaintiff filed the action in the court below seeking special and general damages arising out of the appellant's trespass to plot 106 situate at Luwero Trading centre. The appellant, who was the owner of plot 107, had wrongfully entered on the suit land on or about the 10th April 1990 and demolished the respondent's building of four rooms. The respondent brought a claim for lost rent for 44 months and the value of the destroyed building and other materials, all totalling to a sum of shs.4, *584,000/=*. The respondent further prayed for an order of demolition of the building the appellant had constructed on plot 106.

4. 1 will set out paragraphs 4, *5,* 6, 7, 8,9 and 10 of the plaint.

"4. The Plaintiff is the registered owner of Plot 106 situate at Luwero Trading Centre. A photocopy of the Certificate of Title is annexed hereto and marked "A" and shall

be referred to at the trial for its full content, meaning and effect."

"5. Before he became the registered owner of Plot No. 106 the Plaintiff was occupying it as a

customary tenant, having brought it from his brothers who had inherited it from their father, one Aman Mukalazi. It had buildings thereon."

"6. In 1986, the plaintiff applied for a lease of the same."
"7. Before the Plaintiff could be granted a Certificate of Title, the defendant fraudulently obtained a lease and Certificate of Title of the same."
"8. The defendant had been the registered owner of the adjacent Plot No. 107 and built a commercial building which extended to Plot No. 106 by 9 ft."
"9. The Plaintiff filed H.C.C.S. No. 9 of 1992 against the defendant for cancellation of the Certificate of Title of Plot No. 106 and on 14/04/93 the Court made an Order cancelling the Certificate of Title. A copy of the judgement will be produced at the hearing of the case."
"10. While the suit was pending the defendant destroyed the plaintiff's buildings which were on Plot No. 106."
5. The appellant responded to this claim by filing a written statement of defence that, inter alia, challenged both the jurisdiction of the court, and also contended that this suit was frivolous and vexatious as the respondent had filed an earlier suit in which the respondent succeeded against the defendant. The appellant did not name the civil suit referred to but it is clear from the contents that it is H.C.C.S. No. 9 of 1992 between the same parties.
6. The learned Chief Magistrate in his judgment did not consider the question of res judicata. This may not be surprising as appellant's counsel did not participate in the hearing of the case and issues were only framed by the respondent's counsel in his address to the court at the conclusion of the hearing of the case. Later on in the judgment the learned chief magistrate states that he approves of the issues suggested by counsel for the defendant. I suppose this reference to counsel for the defendants must be a mistake as the defendant appeared in person at the commencement of the hearing of the case through to the conclusion of the hearing of the case.
7. The earlier suit, H.C.C.S.No. 9 of 1992 was filed on 6th January 1992 by the respondent against the appellant. It sought for a cancellation of the appellant's certificate of title to Plot No. 106, Luwero Trading Centre, on the grounds that it had been fraudulently obtained. I will set out below the relief that was sought in that case.
8. "(a) Cancellation of Plot 106 from the Certificate of Title above
(b) Permanent Injunction

(c) Alternative Compensation to be assessed

(d) Damages

(e) Interest at *50%*

(f) Costs of the suit"

9. After a hearing of H.C.C.S.N. 9 of 1992, which proceeded in the absence of the appellant, the court made the following remarks at the conclusion of its judgment, "I think this is a straightforward case. My conclusion is that the plaintiff had established fraud. The defendant must have obtained the Certificate of Title referred to by fraud. He must therefore deliver up this title deed for cancellation of Plot 106 thereof.

Alternatively compensation for improvements can be ascertained and paid. Counsel did not address me on the question of damages included in the prayer. I take the view he intended to abandon it."

10. For whatever reason, which is of course only known to the respondent and his counsel, the claim for damages arising out of the appellant's trespass to and fraudulent conversion of Plot 106 was abandoned in the earlier suit and resurrected in the later suit. It is clear to me that this claim for damages was part of the earlier suit, perhaps, inadequately pleaded.

11. The damage claimed in the later suit is alleged to have been committed while the earlier suit was already filed and pending. See paragraph 10 of the plaint set out above. But this is put to the pale by paragraph 12 of the same plaint where the claim for loss of rent from demolished building is claimed from the 10th April 1990. This date is well before the filing of the previous suit on 6th January 1992.

12. Mr. Christopher Madrama learned counsel for the appellant submitted that the present suit was res judicata offending the provisions of Section 7 of the Civil Procedure Act. The parties to the present suit were the same parties in the previous suit. The subject matter was the same. In the previous suit, the claim for damages was abandoned, and therefore ought not to be raised afresh. He referred to the case of Semakula v Magala & others [1979] HCB 9 in support of his submissions.

13. Mr. Ayigihugu, learned counsel for the respondent, submitted firstly that the appellant can not avail of himself the claim that this suit was resjudicata as this was not raised at the trial. Secondly he submitted that this matter was not res judicata as there were two different causes of

action which could have been combined in one action or taken separately as the appellant had done. The claim in the previous suit was for cancellation of title based on fraud. The present claim was a claim for compensation for his interest as a customary tenant which claim could proceed even if the claim for cancellation of title was defeated. There was no way the complainant could have included in the previous suit the claim for damages in respect of the destroyed property.

14. With the greatest respect, I am not persuaded by the submissions of counsel for the respondent. Firstly it is clear from a reading of the written statement of defence that it was raised, though I must say in the most inartistic way, that there was a previous suit, between the same parties and over the same subject matter, already decided in the respondents favour. There was the claim in paragraph 4 of the written statement of defence that this trial court lacked jurisdiction to try this suit. I do not agree therefore that the appellant did not raise the plea of resjudicata.

15. And even if the appellant had not raised the plea of res judicata at the trial I have no doubt in mind that a court is under a duty, whether at the trial or even on appeal for the first time, to give effect to the provisions of a statute. Courts are barred from trying suits in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties. The language of the provision is mandatory, denying courts any jurisdiction to entertain such claims. The court can not therefore turn a blind eye to the substance of the provisions merely because for some reason the matter was not raised in the court of first instance. The court has the competence to entertain such a matter of law. Once this is ascertained at whatever stage of the proceedings including on appeal, the court was under an obligation to give effect to the provisions of the statute.

16. The language of the Statute seems to be very clear. It grants no room for manoeuvre or avoidance. I will set out Section 7 of the Civil Procedure Act below.

“**7. Res judicata.**

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.

Explanation 1.—The expression “former suit” shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior to it.

Explanation 2. For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation 3.—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

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.

Explanation 5.—Any relief claimed in a suit, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation 6.—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in that right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

17. In arriving at the conclusion I have come to above I take comfort in the decision of the Privy Council in the case of Tsamburakis v Rodussakis [1958] E.A. 400. In that case the trial court made a decision on a preliminary point. No appeal was filed within the time allowed for appeals against decisions of that kind. In an appeal against the final decision of the trial court the Court of Appeal refused to consider grounds attacking the trial court’s decision on the preliminary point holding that such grounds were incompetent for being time barred. The Privy Council disagreed, holding at page *405*, “that no procedural defect could relieve the Court of Appeal of its duty to give effect to the Statute on an appeal from ajudgement given in favour of the plaintiff in respect of a time-barred cause of action.”

18. I now turn to the second limb of the submission of Mr. Ayigihugu. He asserts that there were two separate causes of action, which could be litigated separately. One was the claim for cancellation of title on account of fraud, and the other is the claim for compensation as a customary tenant. I am not persuaded by this distinction. A close examination of proceedings indicates that there was an attempt to portray the latter claim as having arisen after the filing of the previous suit. See paragraph 10 of the plaint which states that the while the previous suit was pending the defendant destroyed the plaintiff’s building. The previous suit was filed on the 6th January 1992.

This would suggest that the destruction of the buildings occurred after 6 January 1992.

19. Paragraph 10 seems to be an attempt to set up a separate and new cause of action from the actions complained of in the previous suit. But this is defeated by the claim in one of the succeeding paragraphs, paragraph 12 to be exact. In this paragraph the claim for rent arising from the destruction of the buildings is dated to commence from 10th April 1990. The award in the judgment is too from the 10th April 1990. Obviously at the time of the filing of the former suit the destruction of the appellants building had already occurred.

20. At the same time a close look at the pleadings all indicate that the respondent's action in both the previous suit and current one were grounded on the fact that he possessed customary title to Plot 106. He had claimed damages in the previous suit, perhaps in an inadequate way, but nevertheless the claim had been made. The trial court in the previous suit concluded that the claim had been abandoned; Explanation *5* in Section 7 above expressly states that any relief claimed in a suit, which is not granted, shall be taken to have been refused.

21. Even if there were two separate causes of action, as contended by Mr. Ayigihugu, the said two causes of action were grounded in the same matter that was directly and substantially in issue in both the previous suit and the latter suit. This was the claim that the appellant had trespassed on Plot 106, held under customary tenure by the respondent, and fraudulently obtained a Certificate of title to the same. Of course it was possible to commit one and not the other. That is to obtain fraudulently the Certificate of Title to Plot 106 without physical trespass to the same or vice versa. In that regard they could be regarded as two separate causes of action.

22. Nevertheless in considering whether a matter is res judicata or not what we have to consider is not whether the causes of action are different as such but whether those two matters in question were directly and substantially in issue in both suits, even if it gave rise to different causes of action. In the previous suit in setting out particulars of fraud, the plain vide paragraph 11(c) thereof, cites the trespass of the appellant to plot 106 by 9 feet. Once the respondent chose to cite the appellant's alleged trespass to pot 106, that occurred before the filing of the previous suit, the question of trespass to the property had been brought directly and substantially in issue. And the question of any damage or compensation arising out of trespass committed before the filing of the pervious suit, ought to have been litigated in that suit, unless there were fresh acts of trespass, raising a new cause of action. The acts of trespass alleged to have been committed in

April 1990, well before the filing of the previous suit, were in that regard not new causes of action that could be litigated afresh.

23. Assuming that there had been no claim of damages; would the appellant have been entitled to bring a fresh action for damages in the instant case? Explanation 4 in Section 7 states that 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. A claim for compensation ought, in my view, to have been part of the heads of claim in the previous suit, that is , one of the grounds of attack, if I may use the expression, upon the defendant. Indeed in the prayer for relief in the previous suit one of the items prayed for was that, “Alternative Compensation to be assessed”. The respondent had in the alternative actually sough compensation form the appellant in the previous suit. In addition the respondent had also claimed damages.

24. In the result I am satisfied that the matter in issue in the previous suit was directly and substantially in issue in the present suit. It is therefore barred by section 7 of the Civil Procedure Act. The trial court was barred from entertaining it. I will allow that appeal in this ground with cost here and below. The judgment, decision and decree of the Chief Magistrate Court is set aside. The suit filed in that court below is struck out. In light if the decision I have arrived at it is not necessary to consider the other grounds of appeal.

Dated, Signed and Delivered at Kampala this 12th day September 2002

FMS Egonda-Ntende Judge

Judge