THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CV-CA-0031 -2004

(From MBR-00-CV-CS-011-1997)

SEBASTIAN TUMWEBAZE ……..……APPELLANT

VS

SCHOLA GANYWA …….RESPONDENT

BEFORE: THE HON. MR. JUSTICE P. K. MUGAMBA

JUDGMENT

On 29th April 2004 the Chief Magistrate Mbarara delivered her judgment in favour of the respondent. The appellant sets out four grounds of appeal in his memorandum which state:

1. The trial Chief Magistrate erred in law and in fact when she proceeded to hear and determine the case on merit when the same was Res judicata.

2. The trial Chief Magistrate misdirected herself when she proceeded to write a judgment without first giving the appellant chance/opportunity to present his evidence thereby condemning the appellant unheard contrary to the known natural principal of justice (sic).

3. The trial Chief Magistrate erred in law and on evidence when she proceeded to write a judgment on amended plaint which amendment had been made without leave of the court and without hearing from the opposite party.

4. The trial Chief Magistrate failed to appreciate that the plaint did not disclose a cause of action against the appellant and as such erroneously entered judgment in favour of the respondent.

Section 7 of the Civil Procedure Act states:

> ‘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’.

Evidently there had been a suit between the parties here before the R.C. 1 Court of Nshumi. The suit concerned ownership of a kibanja. The R.C.1 Court made a decision in favour of the appellant herein. An appeal by the respondent herein and others to the R.C. II Court confirmed the decision of the R.C.1 Court. There is no evidence of an appeal against the R.C.II decision. Yet the Executive Committees (Judicial Powers) Act provided that an appeal should lie from the judgments and orders of a parish executive committee Court to a sub-county executive Committee Court. Because there was no appeal the decision of the R. C.II Court should have brought finality to the proceedings in the matter. Instead the respondent herein filed a suit in the Chief Magistrates’ Court Mbarara disputing appellant’s ownership of the kibanja in issue.

Res judicata is a fundamental doctrine which militates for an end to litigation. It is the spirit of the doctrine that one should not be vexed twice for the same cause. Nemo debt bix vexari pro una et eadem causa. It is a requirement of justice that every matter should be fairly tried and having been fairly tried once all litigation about it between the parties should come to an end. If in another suit the plaintiff is trying to bring before the court in another way and in the form of a new cause of action a transaction which has already been before a court of competent jurisdiction and which has already been adjudicated upon, the doctrine of res judicata will apply. The plea of res judicata applies then not only to points upon which the first court was actually required to adjudicate but the very point which the parties, exercising reasonable diligence might have brought forward at the time. See *Kamya and others vs The Pioneer General Assurance Society Ltd.* [1971] EA 263. In Onduri *vs Motoka* [1977] HCB 128 where a fresh suit was brought in respect of the same piece of land whose dispute had been settled by court the suit was held to be res judicata. The suit being appealed is a classic example of a suit which is res judicata and this ground of appeal should succeed.

The second ground of appeal concerns court's decision to proceed to pass judgment without affording the appellant herein opportunity to make a defence. In the event the suit land was declared not to belong to the appellant hut to the respondent and others, a permanent injunction issued against trespass on the suit land by the defendant, who was also condemned in costs. I turn to the occasion leading to this ground of appeal for reflection. The following appears on the record of proceedings so far as is relevant.

> '16/3/20 04 Mr. Katembeko for plaintiff
> Plaintiff here.
> Defendant absent
> Mr. Magoba for defendant is in High Court.
> Defendant has been consistently absent.
> C/Plaintiff: I pray matter goes on for judgment.
> Court: Hearing closed Judgment on 26/4/2004.'

While it is true the defendant was absent on the occasion and that his record of attendance left much to be desired, court acknowledged that he had an Advocate to appear on his behalf and that that Advocate was on that critical date engaged in the High Court which, needless to say, takes precedence over the trial court. The absence of the defendant should not have caused court to move straight to judgment omitting the occasion for defence. There is no knowing what counsel for the defendant had to say regarding defence since he was mandated to appear on behalf of the defendant as was the occasion on 22nd January 2004. Clearly court was aware counsel was before the High Court and the learned trial Magistrate should have adjourned the matter to hear from counsel for the defendant in the premises. I find that the trial Magistrate acting the way she did denied the defendant the right to be heard in defence, enshrined in the rule of natural justice of audi alteram partem. The proceedings thereafter were a traversty of justice and should not be allowed to stand. This ground of appeal also succeeds.

The third ground of appeal relates to the manner in which the plaint came to be amended. Order 6 rule 18 of the Civil Procedure Rules gives wide latitude to amendment of pleadings. The general rule to my mind is that application to amend pleadings will be allowed provided such amendment does not cause injustice to the other party and where necessary this can be

compensated by costs. On 22nd January 2004 counsel for the plaintiff intimated to court that he sought to amend the plaint with regard to paragraph 6. Court proceeded to allow the amendment after he had read that paragraph to be amended detailing the amendment. That amendment is evident in the amended plaint which was filed on 28th January 2004. However also evident in the amendment is amendment to paragraph 8. I find no licence to such an amendment which clearly was done without leave. I agree with the submissions of counsel for the appellant that the Chief Magistrate should in the circumstances have not gone ahead to write her judgment basing it on the amendment as she did.

Regarding whether or not there was a cause of action. I have already pronounced myself on the effect of the amended plaint which was filed without leave. I do not agree with counsel for the respondent that such pleadings could have contained a cause of action. The proposed amended plaint agreed to by court was not one actually filed as the contents of paragraph 8 would indicate. The proposed amendment was for paragraph 6. 1 must reiterate for emphasis. This ground also should succeed.

All in all this appeal is allowed and the judgment of the Chief Magistrate is set aside. Costs of this appeal and in the court below to the appellant.

P.K. Mugamba

Judge

2nd February 2005