

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE**

HCT-04-CV-CA-0001-2010

(Arising from Mbale Civil Suit No.21 of 2006)

WOBUJJE GOMEI.....APPELLANT

VERSUS

MAGIDU WANIALE.....RESPONDENT

BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN

JUDGMENT

This appeal arises from the decision and orders of the Magistrate Grade I Mbale handed down on 21 December 2009 where he held that Civil Suit 21 of 2006 between the parties hereto was *res judicata*.

The appellant is represented by Mr. Dagira and respondent by Mr. Mutembuli.

The background to this appeal as outlined by Mr. Dagira learned counsel for the appellant and seconded by Mr. Mutembuli learned counsel for the respondent is that Magidu Waniale the respondent filed land Claim No. 18 of 2006 on 30th January 2006 in the defunct Mbale District Land Tribunal against one James Magode Ikuya seeking *inter alia* to compel the said James Magode Ikuya to

transfer Plot 42 Nkokonjeru Court Mbale Municipality into the names of the respondent. James Magode Ikuya filed a defence thereto on 17 February 2006.

In its decision of 15th November 2006, the Land Tribunal declared that plot 42 Nkokonjeru Court Mbale Municipality belongs to the respondent and that the Registration of Plot 42 in the names of Wobuje Gomei the appellant was null and void.

Consequently, the respondent Magidu Waniale filed in the High Court, HCMA No.204 of 2006 against James Magode Ikuya to cancel the certificate of title of Plot 42 and substitute therefor with the respondent's names.

On 28th May 2007, the appellant herein through M/s Dagira & Co. Advocates filed HCMA No. 42 of 2007 against the respondent and James Magode Ikuya to be joined as second respondent in HCMA 204 of 2006. Court granted the order to that effect.

In the meantime, James Magode Ikuya filed in the land tribunal Miscellaneous Application 67 of 2006 against the respondent to set aside "the *ex parte* judgment" in claim 18 of 2006 so that he be heard in defence. The appellant herein yet again filed claim 21 of 2006 in the land tribunal through M/s Wesamoyo & Co. Advocates against the respondent for general damages for trespass upon his land i.e. Plot 42. The respondent herein filed a defence to the claim on 10 February 2006 through Ms/ Olubwe & Co. Advocates.

Both Miscellaneous Application 67 of 2006 and Claim 21 of 2006 were transferred to the Chief Magistrates Court Mbale and were registered using the same numbers.

On 13th November 2007, the appellant filed in the Chief Magistrates Court Miscellaneous Application No.43 of 2007 (arising from Civil Suit 21 of 2006) against the respondent to be allowed to amend civil Suit 21 of 2006. The application was allowed on 24th June 2008. The appellant was ordered to file and serve the respondent the amended plaint by 10th July 2008 and the respondent to file an amended Written Statement of defence by 28 July 2008.

Both parties complied.

When the suit came up for hearing on 16. September 2009 learned counsel for the respondent raised a preliminary objection that the Civil Suit was *res-judicata* and on 21st December 2009 the Court upheld the objection hence this appeal.

The grounds of appeal are that:-

- (i) The learned trial Magistrate erred in law and in fact when he dismissed the appellant's claim on the ground of *res-judicata*.
- (ii) The decision complained against occasioned a miscarriage of justice.

Each of respective counsel were allowed to file written submission in support of their respective cases. The respective submissions are on record and will not be reproduced in this judgment. Suffice to mention that I have studied the said submissions.

I have also studied the lower court records.

I have read the wealth of authorities presented by counsel for my assistance. The duty of this court is to re-evaluate the lower court's evidence or basis for the appealed decision and reach its own finding and conclusion.

I will deal with each ground of appeal separately.

Ground I

In support of this ground of appeal, Mr. Dagira learned counsel for the appellant dwelt on the meaning of the term *res judicata* as set out in S.7 and 8 of the Civil Procedure Act.

He submitted that the minimum conditions that have to be satisfied to render a cause *res judicata* are that:-

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

Mr. Dagira further submitted that the parties in claim 18 of 2006 and Civil Suit 21 of 2006 are different and therefore the said claim is not *res judicata*. That the raising of the plea of *res judicata* by counsel for the respondent was an ambush and improper in the circumstances of the case.

Further that neither the pleadings forming part of the record nor the judgment in claim 18 of 2006 were listed on the amended written statement of defence nor

produced at the trial of Civil Suit 21 of 2006. That Civil Suit 18 of 2007 was not proved to be *res judicata*.

In reply Mr. Mutembuli learned counsel for the respondent submitted to the contrary but agreed to the principles governing the operation and effect of the plea of *res-judicata* as provided under Sections 7 and 8 of the Civil Procedure Act.

I agree with the submission by learned counsel for the respondent that whereas the appellant was not party to Mbale District Land Tribunal Claim No.18 of 2006, he is bound by its decision to the effect that plot 42 Nkokonjeru Court belongs to the respondent herein. The Tribunal judgment was on the issue of who was the rightful owner of Plot 42 Nkokonjeru Court Mbale Municipality. The Tribunal held that the owner is Magidu Waniale the respondent and that the registration of plot 42 in the names of Wobujje Gomei the appellant was null and void. This judgment whether correct or not has to date not been set aside or varied by any Court of Law. As far as the issue of ownership of Plot 42 Nkokonjeru Court is concerned, the decision of Mbale District Land Tribunal is a decision in *rem*. It binds the whole world.

As rightly submitted by learned counsel for the respondent, it was improper for the appellant-Wobujje Gomei to file a fresh suit against the respondent for trespass to recover the same plot of land. The best he could do was to file for Review of the said decision under O.46 CPR.

Res judicata in latin means” a thing decided.” This doctrine prevents a litigant from getting yet another day in court after the first law suit is concluded by giving a different reason for litigating. It is intended to preserve the effect of the first

judgment to avoid contradiction with the earlier judgment leading to a multiplicity of judgments.

When a court of competent jurisdiction has entered a final judgment of the merits of a cause of action the parties to the suit and those who claim under them (privies) are bound by the decision. This claim can be determined when it is concluded that the judgment was based upon either or any two or more distinct facts the one pleading *res judicata* must show the earlier judgment was based on.

In the instant case, a decision would not have been made if the question of ownership was not determined by the tribunal.

As rightly outlined by learned counsel for the respondent, the latter purchased the suit land from James Magode Ikuya on 23rd December 2005 and immediately took possession thereof. The appellant allegedly bought the same plot from the same James Magode Ikuya, a brother-in-law, on 14th December 2005 but did not take possession. These transactions were interestingly executed barely 10 days between each other! There is something fishy here. The respondent filed a suit against James Magode Ikuya to transfer the suit property into his names on 30. January 2006 to which James Magode Ikuya filed a defence on 17th February 2006. On the other hand, the appellant filed his suit in the tribunal against the respondent on 10th February 2006. While the matters were still pending before the tribunal, James Magode Ikuya transferred the suit property into the names of the appellant who was registered as proprietor. Remember these are brothers-in-law. Both James Magode Ikuya and the appellant were using the same advocates i.e. M/s Wesamoyo & Co. Advocates who made their agreements of sale and it is the very firm which

filed the suit against the respondent on behalf of the appellant and also filed the defence for James Magode Ikuya. This fact is not rebutted in the appellant's submission in rejoinder.

I agree with Mr. Mutembuli that it appears the duo are working together to defeat the interest of the respondent in the suit land.

Therefore even if the appellant was not a party to claim 18 of 2006, he was aware of the existence of the said suit.

Although the causes of action in claim 18 of 2006 and 21 of 2008 are different the subject matter is the same, plot 42 Nkokonjeru court. The ownership of this plot was determined by the land tribunal as belonging to the respondent. The respondent cannot trespass on land belonging to him.

A matter is *res judicata* if 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....” Incidentally, the appellant is mentioned and referred to in the tribunal judgment. He derives his interest from James Magode Ikuya who lost the case.

A multiplicity of suits regarding the same subject matter (plot 42) is unfair and intended to waste judicial resources. As I have said hereinbefore the appellant was fully aware of the litigation going on in the tribunal. He had the opportunity to join the lower tribunal litigation if he had applied to do so. If he missed this opportunity then recourse should have been had to a review.

I am of the considered view therefore that the learned trial Magistrate rightly held that claim 21 of 2006 is *res judicata* vis a vis claim 18 of 2006 since the judgment in the latter claim affects the appellant and is bound by it until it is set aside.

The issue of *res judicata* is a point of law which can be raised at any stage of trial or proceedings. It is not mandatory that it must be pleaded.

It is not true as submitted by Mr. Dagira that there was no record or judgment of claim 18 of 2006 produced in the trial of CS 21 of 2006. The record was there and as I write this judgment it is on record. The trial Magistrate relied on the said record to reach his decision.

Ground II

In view of my findings regarding ground I of the memorandum of appeal, I have found no miscarriage of justice occasioned to the appellant as a result of the lower court decision.

Consequently, I will order that this appeal be and is hereby dismissed with costs.

Musota Stephen

JUDGE

5.4.2011

5.4.2011

Both parties in court.

Nabende Isaac on brief for Mutembuli for Respondent.

Kimono Interpreter.

Nabende: For judgment and we are ready to receive it.

Court: Judgment delivered.

Musota Stephen

JUDGE

5.4.2011