THE REPUBLIC OF UGANDA

IN THE HIGH OF UGANDA HOLDEN AT ARUA

CIVIL APPEAL NO. 0045 OF 2008

MARTHA KAPALANGA
& SIX OTHERS _____ APPELLANTS

=VERSUS=

MARTINA NUNU & ANOTHER _____ RESPONDENTS

JUDGMENT

BEFORE HON. JUSTICE NYANZI YASIN

Background of the case

I would originally not have detailed facts of the case on appeal but it surprise that neither the appellant (who had a bigger duty to) me his respondent stated the facts of the case which constituted their appeals. Interestingly still, the trial court did not state the facts and it is normally the case as far as it can be gathered, the following is that between the appellants and the respondent before coming to the trial court.

The colonial government had a policy of allocating land to local community for cotton growing in West Nile region. It is not in dispute that that policy was in existence in 1940s. That is when land in Adjumani central in the area town council was allocated to Alphonsio Debe, who jointly used their land with his brother Lopori Ongili, the father of the 1st respondent Martina Nunu, Tiba Dominic the father of the 1st appellant, one Nzeu Drawi, Mzee Okora and Remendira Mwogonja. The area allocated to each person according to evidence was between 1 to 4 acres.

The land relevant to this appeal and the trial below was the one allocated to Alponosio Debe/Lopori Ongili and Dominic Tiba. Their successors in title disagreed on the correct boundaries of the land allocated by the colonial government.

This dispute particularly arose when Martina Nunu the 1st respondent claiming under Alphonsio Debe and/or Lopori Ongili sold a piece of land to Hilda Ibba the second respondent which was in the neigbourhood of the land with thelate Domonic Tiba's successors in title. The sale of land was in two phases. The first part was sold in 1998. There is no dispute over this sale. The second part was sold in 2000. It is alleged that when this sale occurred the 1st respondent Kapalanga Martha entered into the land sold to Hilda Ibba and constructed a Tukulu (a hut) though according to evidence this hut was built by DW3 Mr. Nyanda Ronald Ivan, who is a biological son of the 1st appellant and therefore a grand son of late Dominic Tiba and his claimant.

According to Martina Nunu this hut was constructed on the land she sold to Hilda Ibba. Hilda Ibba also claimed that her water installations were destroyed. The respondent tried to stop this construction through L.C in vain hence this suit to the Magistrate court.

They applied for injunction and were granted on orders of temporary injunction which DW3 admitted to have ignored and completed the Tukulu (hut).

The trial Court heard the case in full, visited the locus in quo where it received further evidence from both sides. Written submission which were almost covering all issues were filed in court. Upon which court decided the case in the favour of the respondent. The appellants were dissatisfied with the decision of His Worship EREEMYE JAMES Grade I at Adjumani, hence this appeal.

Ms Madira & Co. Advocates represented the appellant who were the defendants in the lower court, M/s Akile, Olok & Co. Advocates acted for the respondents.
For the appellants, M/s Madira & Co. Advocates filed a memorandum of Appeal containing 3 grounds namely;-

1. That the learned trial Magistrate erred in law and in fact when he held that the suit was resjudicata and caused a miscarriage of justice by appellants who were immediately dragged to Court.

2. That the learned trial Magistrate went against the evegant of evidence on record to find that the disputed land belong to the respondents.

3. That the trial Magistrate erred in law and fact in awarding the respondents excessive reliefs to the prejudice of the appellants.

Both sides proceeded by filing written arguments in court, the appellants filed their submission on 7th Jan. 2010 and the respondents replied on 3rd.02.2010. I will answer the grounds in the order they were presented and argued. However I must state that as an appellant court I am bound to review all the evidence and make my own conclusion upon evaluation of all the events in the trial. See the case of ***DANIDYA =VS= R [1957] EA 360***

GROUND ONE

The learned trial Magistrate erred in law and fact by holding that the suit was resjudicata and occasioned miscarriage of justice by dismissing the suit against the appellants who were innocently dragged to court.

I must on the onset state that the language in which the above ground is framed is ambiguous. It is hard to comprehend what the appellants mean by stating that the case was dismissed against them when it was not their case. In the language of the trial Magistrate he never stated that the suit is dismissed against the appellants. Neither did he say at all that the suit is dismissed. He with out respect went around the situation by, in effect stating that the earlier case of 1976 proved the boundaries consequently the land belonged to the respondents, to give meaning to the first ground of appeal it can be rephrased and as below.

> ***"The trial Magistrate erred in law and decided the case instead of dismissing it having found that it was resjudicata"***

The above reframed ground is a clearer complaint the drafting in the memorandum of appeal. That is how I will treat it.

The back ground to that ground is that it came out of an issue which was correctly in view framed by the trial court to the effect that whether the suit before the trial court was resjudicata. The trial Magistrate reached decision to frame the issue after listening to the evidence of particularly Martina Nunu, the 1st respondent and PW4 one Anyaku Akuma Solomon. The two gave evidence before court that there had existed before this case, a similar suit, between Martina Nunu and Kapalanga and the same matter was decided in favour of the respondent. That piece of evidence forced the trial Magistrate to frame an issue as to whether the suit was resjudicata. He was entirely right in so doing and correctly cited and relied on to ***ERYN BARUGARE =VS= A.G. SCCA NO. 28 OF 1993***. Where it was held that the trial Judge may amend the issues strike out some of them or even add new ones any time before passing of the decree.

I will now state the evidence which was given on that issue. PW1 Martina Nunu told Court as follows;-

> ***"In 1976, I took Kapalanga to court. When my father was still alive. When my father dies they tried to grab the land.....court was presided over by a Magistrate called Mane and court used to sit at community centre. The documents got destroyed during the war. The parish Chief who witnesses the locus is still alive. But the Magistrate died. I cannot remember the serial number of the case but the matter was decided in my favour (written in error as father).***

The second relevant position of evidence on that issue is given by PW4 Anyaku Akuma Solomon. Relevantly he told court that';-

> ***"I was a clerical officer with court of judicature. I work in several places. Since 1975 – 1989, I was in Moyo then Pakele court. In 1976 I was sent to Pakele court, because the clerk there was sick. While there, I found a file of land dispute the Magistrate was Mane Milton Moigo magistrate grade II who is now deceased.***
> ***.....this land dispute was between Martina Nunu and Marita Kapalanga I was present during the dispute of the case. This case took us a week to dispose off. If the files were not to be destroyed during the war, would just be referring to the records..... the matter was heard in court and we proceeded to the locus. There was one Erwanga, a parish chief of Adjumani. I forget the other name.....the court ruled that the western side was of Martina Nunu and the eastern side was of Marita Kapalanga..... I was surprised when I was (requested to) approached to help find out the records of the case as the time.***
> ***.....if all files were not destroyed by the war, we would have received the register or the file record".***

In cross examination PW4 added the following

> ***"I am the one who attended court and the locus. These files and records were destroyed in 1981"***

In re-examination he said

> ***"During the 1981 war, the soldiers were stationed in Pakele near the rest house and some occupied the court premises. Many people ran away and when we came back to our offices after the war, there was nothing, no files".***

As I have already said, it was because of that evidence that the issue on resjudicata was framed. Basing on that evidence the trial magistrate reviewed relevant authorities. They included ***H. OCHAYA =VS= PETER OGWANG [1976] HCB 33,*** where Allen J. held that;-

1) By virtue of section 22 (1) of the MCA 1970 (now S. 210 (1) cap. 16) a suit which has been disposed of by the court between the same parties is resjudicated should never re-appear before courts.

2) If no appeal is filed against the decision where a right of appeal is available then the parties are bound by the decision and the passage of any number of years will not change the position.

The court below also cited the authority of ***SEMAKULA =VS= SUSANE MAGALA and 2 ORS [1979] HCB 90*** where SAIED C.J. in the court of Appeal decision held that once a plea of resjudicate has been successfully raised the suit must be dismissed. The trial Magistrate finally stated

> ***"I feel bound by these precedents and cannot pretend to retry a cause of action over the same boundary yet earlier court decided on it"***

I will frame two (2) question to answer in handling ground one.

First, was there sufficient evidence for the trial Magistrate to conclude that the suit was resjudicata?

Secondly if so, what proper direction would the case have taken by order of the trial Magistrate.

I will start with statement of the law relating to the doctrine itself. It suffices to state that in ***KARIA =VS= AG [2003] EA 84 TSEKOOKO JSC*** said that the provision of S.7 CPA require that;-

a) There have to be a former suit.
b) An issue decided by a court of competent jurisdiction.
c) The matter in the former suit between the parties must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded.
d) The parties in the former suit should be the same or as in the subsequent suit or parties under whom they claim.

Another relevant case to the present one is ***HCCS No. 353 of 1966 KARSHE –VS- UGANDA TRANSPORT LTD*** (unreported) where Sir Udo Udoma C.J (as he then was) put it this way

> **"Once a decision has been given by a court of competent jurisdiction between two persons over the same subject matter, neither of the parties would be allowed to re-litigate the issue again or deny that a decision had in fact been given subject to certain condition"**

The above is the law relating to the doctrine of resjudicata. I have already reproduced the evidence court accepted and held that the suit was resjudicata.

Under the correct procedure the party that pleaded the doctrine ought to have produced the document to prove the claim. Court proceedings and by extraction of a decree from a declared written judgment. In the present case it was only explained that the records were destroyed during the war. All evidence on the issue was oral. If court accepted there was war and revot took judicial notice of the same. What do the I am say? S. 58 of the evidence Act provide

> **"All facts *except the contents of documents* may be proved by oral evidence (emphasis added)**

Court proceedings, court judgment and decrees are all documents meaning they cannot be proved with oral evidence S.58 Evidence Act should be read together with S.92 of the same act. Under S.92 a court judgment or decree are matters required by law to be reduced to a form of a document therely excluding acceptance of oral statements.

I observe and agree that there was effort to explain that the records were destroyed during war and court took judicial notice of the same. But court could only take judicial notice that there was a war in that area at that time it could not say and it was wrong to say that it had taken judicial notice that the court records were destroyed. Consequently on the first part of this issue I find that oral evidence was wrongly accepted.

However, even if it was permissive to accept such orally, would that evidence have explained all the issues listed KARIA's case (supra)? My view is that it was not. That evidence was not sufficient to explain to the required standard that there was a suit between the same parties. That the issue in the present suit was directly or substantially the same issue in the former suit, that court was of competent jurisdiction. All that was explained and could be ascertained from evidence of PW2 and PW4 can be said to be that it was proved that there was a former suit. I do not believe that the same evidence proved what the actual issues were, whether court had jurisdiction and who actually were the parties?

To establish those facts some documentary proof was required. No oral evidence could sufficiently replace a written judgment or decree. I therefore do not agree that there was enough evidence for the trial Magistrate to conclude that the suit was resjudicata.

2. **Proper Procedure**

However if the trial Magistrate was to be correct that the suit was resjudicata with due respect it was an error not to have dismissed the suit. The trial court quoted and the case of Sumakira (supra) where it was held that

> ***"Once the plea of resjudicata is successfully raised, the suit must be dismissed (emphasis added)***

The only right thing he would have done was to dismiss the suit and not to purport to hear it. The trial Magistrate said himself and rightly in my view if there was evidence that the suit is resjudicata that

"I feel bound by these authorities and can not pretend to ratify a cause of action over the same boundary"

To that extent he was right and that is the furthest he would have gone. It was an error to make any furthest he would have gone. It was an error to make any further declarations. However in the right of my earlier findings, his error is of no consequence.

In the final result although for different reasons from those of the appellant, ground 1 is merited and succeeds.

GROUND TWO

The trial Magistrate went against the weight of evidence on record to find that the disputed land belonged to the respondent.

The above ground remains to be the ground to resolve this case in light of the finding on ground one. It is not worthy that the trial court framed the issue below.

"Whether the plaintiffs have an interest in the land or not"

Unfortunately because the trial Magistrate with due respect erroneously found that the case before court was resjudicata, he never resolved it by review of evidence. The issue before court now is whether on the weight of evidence on record the disputed piece of land belongs to the appellants as the ground seem to suggest.

Although the trial court never addressed itself to his issue this court as an appellant court has the power to do so. In ***PANDYA =VS= R [1957] EA 336*** it was heard that the duty of the Judge of High Court in deciding on appeal

of first instance is to subject the evidence on record to fresh and exhaustive scrutiny and make his own findings and conclusions.
In a way an appeal of this nature is handled like a retrial. As a judge I am not bound to follow the decisions or findings of the trial court.

See ***SELLE & ANO. =VS= ASSOCIATED MOTOR BOAT CO. LTD [1968] EA 123.*** That is the approach applicable to the present situation and I will follow the same.

It was the appellants strong case that the 2nd respondent bought land that did not belong to the 1st respondent. He also attacked and critised the agreement of purchase. Counsel strongly argued that the disputed land belonged to the appellants. He relied on evidence of TIBA ASUMPTA OKELLO PW4 according to counsel as stated below

> ***"The only person who was present when the land was being allocated testified in court that the disputed land is part of the land that was allocated to her late husband TIBA DOMINICO. That she was present the time of allocation and knows the boundaries very well. That her husband the late Tiba Dominico was given land which is now being claimed by the respondent".***

On the basis of believing that DW4 was the only one present at the time of allocation learned counsel argued as above. However the same witness DW4 said in cross-examination.
"I know there were tractors that ploughed our fields. I know only Lagu who would plough using hands and hoes.

Is it true that DW4 was the only person present as argued by learned counsel? Evidence suggests otherwise PW3 ALIVULE DONOTO aged 70 years is the witness whose evidence has to be evaluated on this point. He told court that he was an employee of Agriculture Department as a driver and used to plough until he retired. For clarity I will reproduce the relevant part of this evidence.

> ***"There was land given to members of Co-operative Society whose names I can tell court. 1. Onili, 2. A brother of Ongili called Albe Alphonsio. These died but I was ploughing for them. There was also TIBA who was neighbouring Ongili who was a Madi and had his children (sons and daughter) like Martina....."***

PW3 was an independent witness who had no interest in the case. DW4 admitted in her evidence that the land used to be ploughed using a tractor and PW3 said he was the ploughing driver.

In her DW3's evidence she said Ongili was not given land because he was in Prison. Evidence of PW3 disproved this when he said Ongili a Madi was the neighbour of TIBA. PW3 was the driver of the tractor and said in his evidence he knew the allocatees and the boundaries. To quote him he said

> ***"The boundary line was made by his tractor and is straight towards the river for all people. I can show them to court"***

He said he knew TIBA and the children. He also knew NUNU Martina and said that in 1976 the Nunu was using Ongili's land.

Another piece of evidence which shows that DW4 was wrong in claiming that Ongili was not given land and equally with due respect to Counsel being wrong in believing her evidence of DRATIA ERWANGA at locus. He said

> ***"I came to know of this land in 1940 when the land was being given".***

In Cross examination by learned counsel Mr. Madira Jimmy Dratia answer as below

> ***"The time of allocation of the land was 1940s and in 1974 I was in office as a Chief. I would even come to advise them or the crops and cotton and the land was used by Ongili".***

Dratia and Dominco are both independent witnesses unlike TIBA DW4. TIBA was in my view driver by interest and been to state or oath in her evidence.

Cross examination that

> ***"I and my husband were given one acre. Lopori Ongili was not allocated land because he was in prison…….Lopiri Ongili is the father of Martina Nunu".***

Dominico and Dratia could not loose anything to state that Ongili was not given land and that he was in prison if it was the truth, I prefer their evidence to the evidence of TIBA who was driver by interest. She and her children had in the land to state that Ongili never got land. That kind of belief which was not true drove her and her children to take over Ongili's land convinced that Ongili never got land which is not true according to available evidence.

Having established that Ongili from whom Martina Nunu inherited had land in the west, the issue is what were the correct boundaries between the two.

According to DW4 the boundary of the land was from North to south and there was a path. She referred to a Guava tree which is still there. I have read her evidence on boundaries at page 53 of the record of appeal and found that she described the boundaries in a manner that was very complicated compared to other witnesses.

PW3 in court said the boundaries were straight running to the stream. At the locus he said the boundaries were running from the valley coming upwards and the showing them to court that visited the locus. He relevantly said that during the ploughing of the land they would heap soil at the boundary line and that is what he followed. In cross examination he re-affirmed his clear knowledge of the boundaries. He said

> ***"I know the boundaries which I used to plough. I even told court that I would show the boundaries and I am the one who can tell the right boundaries".***

I have compared the evidence of the two sides on the boundaries. I prefer and agree with evidence of Dratia at court and Dominico to the complicated explanation of DW3 which is not at all clear and uncomprehendable. She had her own reasons got not being clear. She had an interest to know.
I preferred dealing with the historical aspect of the case that is how the land was allocated because the current disputants inherited the land from the original allocates.

Having found that it is true that Ongili was allocated land for cotton growing it is that land that his daughter Nunu the 1st respondent took over. I have also upheld the boundaries as told by the independent witnesses who all say

that there were straight boundaries running to the stream. In conclusion therefore I find that on record available the 1st respondent had an interest in the land as a successor in title to her father and could validly sell ……interest to the 2nd respondent.

I do not with due respect found the critics leveled on the agreement of sale relevant to this appeal having established that Nunu had land to sell to IBBA.

Consequently ground two of this appeal fails.

Ground 3

That the trial Magistrate erred in law and in fact in awarding excessive reliefs to the prejudice of the appellants.

In order to establish whether or not the award was excessive I will start by referring to what was prayed. In the amended statement of claim filed in court on 15/10/2007 the claimants now respondents prayed for a declaration that the land was theirs, eviction order, permanent injunction, mesue profits, damages for trespass and costs of the suit.

I must note as I have already stated it was an error having found that the suit was resjudicata for the trial Magistrate to proceed and pronounce relief. I have already dealt with that I will not repeat it here. However in the light of my holding on ground 2 I would on my own declare that the land in dispute belongs to the second respondent who purchased it from the 1st respondent. If the appellants are still in occupation that they vacate the land and grant a permanent injunction against the appellants and their agents or any body acting under them from interfering with the 2nd respondent's interest in any manner whatsoever.

In ground 3 the appellant's complaint addresses the award of mesue profits and special damages.

Counsal Madira argued that the award was made without any basis. That it was not pleaded. He must have based his argument on the settled position of the law that special damages must be pleaded and strictly proved.

I have read award number 5 which I will reproduce for clarity purpose.

> ***"And since the defendants were trespassers and ought to have known it having even disobeyed court orders not to continue alienating the land I award special damages of 5.000.000= for trespass, damage of crops and soil, tress anguish and inconveniency"***

It is true that special damages were not pleaded. I have tried to give the natural meaning to the words used in the award above and concluded that the trial Magistrate never intended to award special damages but general damages. He only inadvertently used the word ***special damages*** which this court cannot over emphasize. No special damages can be awarded for "anguish" for inconvience, for disobeying a court order.

In my view the trial court meant general damages and by a human mistake wrote special damages. The defence also agreed.

The remaining issue would be whether he was justified in so finding the answer to be traced from evidence. DW3 Nynda Ronald was explicit on their disobedience to court. He said in cross examination

> ***"I sleep in the house upto now. Yes even if the court had ordered an injunction I continued to build the house".***

Such conduct by a person occupying a piece of land the respondent had brought for a different purpose would naturally cause anguish, frustration and incontinency.

Another piece of evidence to support the award in evidence of PW2 at page 31 of the record of proceedings, She said

> ***".....the tribunal wrote to police DPC who sent one officer and L.Cs to the respondents. They told them they can not stop.....after all was police to them.....the police left them. They continued with the construction".***

At page 32 the same PW2 stated;-

> ***"I suffered the following damage. I had planted a fence which was broken by the agents of the defendants. I had a running water tap which was destroyed, the trees that were there, the soil, the land was excavated hence the damages".***

It is therefore not correct as the appellants argued that the award was made on no basis. If they wanted to disprove the respondent's claims they would have cross-examined her in detail. As they did not it has to be taken to have been accepted to be true see ***HABRE INTERNATIONAL CO. LTD =VS= EBRAHIM KASSAM & OTHERS Civil Appeal No. 0004 of 1999 S.C.***

I however entirely agree with learned counsel Mr. Madira that since the 1st respondent had sold the land to the 2nd respondent she did not suffer any damages resulting from the appellant's conduct PW1 in her evidence said that she sold the land in two pieces the 1st one in 1998 and the second one in

2000. That sale relinquished his interest in that land although she could sue or be sued upon it under 1 r 10 of CPR.

Since in the mind of the trial court the awards of shs. 5.000.000= never excluded the 1st respondent I would reduce the award by shs. 1.000.000= and leave shs. Shs. 4.000.000= the appellants must pay for the disobedience of court orders in a blitent manner.

Lastly I have not found any justification for the award of mesue profits over apiece of land that was not developed or being used for commercial purpose by either party. I would disallow the award of shs. 100.000= per month as mesue profits.

In the result this appeal succeeds in part and the following orders or findings are made;-

1. There was no sufficient evidence to conclude that the suit was resjudicata.

2. On evidence available the 2nd respondent is the owner of the disputed land having bought it from the 1st respondent.

3. It is hereby ordered that the appellants do vacate the suit land.

4. A permanent injunction is issued against the appellants and their agents and/or those claiming under them not to interfere with the 1st respondent's interest in the land in whatever way.

5. The appellant will pay shs. 4.000.000= as general damges to the 2nd respondent.

6. The trial court's order awarding shs. 100.000= per month as mesue profits is hereby set aside.

7. The appellants will pay costs of the suit to the respondents

29/06/2011

Mr. Madira Jimmy for appellants.

Mr. Akile Sunday for respondents.

Joyce court clerk.

Third appellant in court.

Respondents present.

- Martina Nunu
- Hilda Ibbia

Judgment read in presence of the above.

NYANZI YASIN

JUDGE

29/06/2011