THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

MISCELLANEOUS APPLICATION NO. 14 OF 2022

(ARISING FROM CIVIL SUIT NO. 013 OF 2021)

MARIO ALI.....APPLICANT

VERSUS

OPOKA SANTO.....RESPONDENT

BEFORE: HON. MR. JUSTICE GEORGE OKELLO

RULING

Brief facts

The Applicant who is a Defendant in civil suit No. 013 of 2021, filed this application under Order 15 rule 2, Order 52 rules 1 and 3 of the Civil Procedure Rules (CPR) S.I 71-1, and section 98 of the Civil Procedure Act (CPA) Cap. 71. He seeks for orders that the issue of law pleaded in his written statement of defence and counterclaim, that civil suit No. 013 of 2021 is res judicata, be heard and disposed of; and that, the issues of fact in the suit be postponed until the issue of law is determined. The Applicant also prays for costs of the Application. The gravamen of the Motion is that the head suit is res judicata. The applicant pleaded factual matters to support the plea. Accompanying the Motion is the Applicant's affidavit, in which he gives detailed facts to buttress the contention. He deposes that,

in 2006, the respondent sued the Applicant in the Local Council II Court of For God Parish, Bar Dege-Layibi Division, Gulu City, over land, in which the Applicant was successful. That, the Respondent successfully appealed to Local Council III Court of Bar Dege Division, however, on a further appeal by the applicant, the Chief Magistate, Gulu, overturned the LCIII Court decision and reaffirmed that of the first court. That, by the latter decision, the applicant was confirmed the owner of the suit land. That, execution process ensued against the Respondent, in respect of taxed costs, sanctioned by the Chief Magistrate Court. That, the Respondent then filed Miscellaneous Application No. 147 of 2014 in the High Court, Gulu, seeking for review of the decision of the Chief Magistrate, and for stay of execution. That, the application was dismissed with costs. That, following the decisions of the trial court and the Chief Magistrate court, respectively, the Respondent was evicted from the suit land by a court order, which placed the applicant in exclusive possession of the suit land, to-date. That, to the Applicant's surprise, the Respondent now filed HCCS No.13 of 2021 on 8th June, 2021, over the same subject matter, and between the same parties, yet the same subject matter was already decided by competent courts. That, *ipso facto*, the suit is res judicata. The Applicant concluded that the matters the respondent raised in the head suit are matters that ought to have been raised by way of objector proceedings, prior to the execution process.

The Respondent opposes the application, and by his affidavit, deposed that civil suit No. 13 of 2021 is not barred by the plea of res judicata. He avers that the land in issue in the head suit was not subject of adjudication before the courts mentioned. That, the subject matter of the head suit relates to 57 acres, whereas what was adjudicated upon in the year 2006 related to only four acres of land, which suit he lost, and conceded. The Respondent's deposition touches on other matters, which court found irrelevant for the purposes of the application and accordingly not adverted to by court.

Representation

The Applicant was represented by Otto- Gulamali & Co. Advocates, while the Respondent was represented by Mr. Ndhego Muzamiru of SMAK Advocates. Both parties filed written submissions.

Issues

Having perused the application and the reply, and upon examination of the material placed before court, two closely related issues arise, namely;

1. Whether court is in position to determine the plea of res judicata on the basis of the pleadings and the material before court, and

2. If so, whether civil suit No. 13 of 2021, lodged by the Respondent, is res judicata.

Arguments

In their respective arguments, both learned counsel did not argue the issues as above framed, but generally submitted for and against the plea of res judicata.

On their part, learned counsel for the applicant reiterated the Applicant's averments that, in the written statement of defence, the applicant had averred that a preliminary point of law would be raised in respect of the plea of res judicata. Learned counsel submitted that the applicant lodged the instant application under O.15 rule 2 and O.52 rules 1 and 3 of the CPR, in pursuit of the averment made in his written statement of defence. I will later comment on the propriety of originating this application under the provision of Order 15 rule 2 of the CPR. Learned counsel submitted that the head suit raises issues which were decided upon by the LC II Court of For God Parish, Bar- Dege Division. He cited section 7 of the CPA on res judicata as well as judicial authorities that have interpreted the section. Counsel argued that the principles that a court ought to consider whenever a plea of res judicata is raised are; the same parties litigating in the former suit should be the same parties litigating under the latter suit or parties under whom they or any of them claim; a final decision on the merits has been given in the former suit by a competent court; the suit or its subject matter must have been directly or substantially in issue in a former suit; the parties should be litigating under the same title; the earlier

suit must have been decided by a competent court which fully resolved the dispute. Court was referred to Ganatra Vs. Ganatra [2007] 1 EA 76, at 82; Basangira Building Contractors (1977) Ltd Vs. AG, HCCS No. 330 of 2009; Allen Nsibirwa Vs. National Water and Sewerage Corporation, C.S No. 220 of 1995; and Kamuhangire Gerald Vs. Kashumba Miisi, Civil Appeal No. 9 of 1998.

Pressing further, learned counsel submitted that the Respondent conceded to several elements, which in counsel's view, prove that the head suit is res judicata. The elements said to have been conceded are; the fact of institution of a suit by the respondent before the LCII Court, in the year 2006, which the respondent lost to the Applicant; the fact of the parties in the former suit and the present head suit being the same.

Without tacitly stating whether it was equally conceded to by the Respondent, learned counsel for the Applicant submitted that the matter in controversy in the former suit was in respect to ownership of the same land now in dispute in the present head suit, which was fully settled in the Judgment of the LC II Court, and confirmed by the Chief Magistrates Court, which counsel argued, were competent. Counsel argued that the matter closed, and the applicant was put in possession of the suit land, by a decree of court.

Arguments were also made relating to aspects of the objector proceedings, which the applicant contended, ought to have been pursued by the respondent, instead of the Respondent lodging a suit in this court. This Court understands that the foregoing submission was made in light of the Respondent's averment in the main suit, that the Applicant was wrongly put in possession of the whole of the suit land (allegedly 57 acres), and therefore the Applicant ought to have restricted himself to only four acres of land decreed by the LCII Court.

In his opposing submissions, Mr. Ndhego, for the Respondent, referred to the Respondent's affidavit, and argued that, it is true his client sued the applicant before the LCII Court, but however, the subject matter of the adjudication at the time was four (4) acres of land. That, his client lost the case, in a decision given by the LCII Court on 21st May, 2006. That, the court allowed the applicant to continue using that land (the four acres). Counsel was emphatic that the LC II court therefore only maintained the status quo on the suit land, thereby leaving each party where he was before the case was filed in that Court. Counsel cited Makerere University Vs. Omubejja Namusisi Farida Naluwembe Namirembe Bwanga, Misc. Application No. 658 of 2013, and explained that status quo denotes the state of affairs existing before a particular point in time. It was also argued that, whereas the Respondent was not satisfied with the outcome of the decision, yet he obeyed it. Counsel contended that the applicant evicted

the Respondent from 57 acres of land yet the same was not subject of litigation before the LCII court. He explained that this is what prompted the Respondent to file the impugned suit in trespass to land.

Learned counsel for the respondent maintained that the subject matter of litigation now is different from that which was adjudicated by the LCII Court. He argued that a perusal of the LCII Court decision does not show what part of the land was under litigation. He therefore invited court to receive some extrinsic evidence, before resolving the issue of res judicata, contending that, the pleadings alone are not sufficient proof of the plea. He relied on the decision of Mubiru, J. in Onzia Elizabeth Vs. Shaban Fadul (as Legal Representative of Khemisa Juma), Civil Appeal No. 0019 of 2013.

Determination

I have reviewed the submissions and the law cited by both learned counsel. At the outset, I shall comment on the applicability of Order 15 rule 2 of the CPR, under which the application is, inter alia, premised.

Order 15 rule 2 provides

"where issues both of law and of fact arise in the same suit, and the court is of the opinion that the case or any part of it may be disposed of on the

issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined."

With due respect to learned counsel for the Applicant, the above provision is no basis for filing a Motion seeking a determination of a preliminary issue. Rather, the provision guides court, once court has been properly moved under 0.6 rule rule 28 of the CPR, on how to deal with the issues of law, once identified pursuant to O.15 rule 1 (5) of the CPR (that is, after reading of the pleadings, and / or examination of the parties or their advocates). Therefore, if court is of the opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first. In such a case, court may postpone the settlement of the issues of fact until after the issues of law have been determined. However, court may also decide to deal with the issue of fact concurrently with the issue of law, if the circumstances so warrant.

The above provision of the CPR was modelled along the provision of O.14 rule 2 of the Indian Code of Civil Procedure, although the provision of the Indian Code has since been amended such that, instead of the use of the words 'shall try those issues first', (the very equivalent of that appearing in O.15 rule 2 of the Ugandan CPR), the Indian Code now bears the words 'may try those issues first'. The latter has been interpreted by the Indian

Courts to be discretionary. So, a court there may decide the issue of law as a preliminary issue or may decide it alongside other issues. This would especially be where the issue is of mixed law and fact, requiring evidence to be recorded by both sides. In such a case, a court would refrain from trying the issue as a preliminary one. See: Mulla Code of Civil Procedure 16th Ed. Vol. 2, page 2217.

Although the wording of the Ugandan CPR appears to be mandatory, our courts, in a given case, may decide that the issue of law is not capable of being disposed of, without receiving evidence. In the humble view of court, the provision of O.15 rule 2 would, in such a case, be directory, although apparently worded in a mandatory fashion. Court notes that, the rule's purpose is to expedite trials. Thus, a court proceeding to record evidence before adjudicating on an issue of law, would have still complied with the provision of O.15 rule 2 CPR, more especially where the issue is of mixed law and fact.

The approach of the courts in Uganda, in cases of preliminary objections, appear to lend credence to the foregoing interpretation. In Hwan Sung Limited Vs. M and D.Timber Merchants and Transporters Limited, Civil Appeal No. 02 of 2018 (SCU) the Supreme Court stated,

"... I think that it is a matter of discretion of the Court as regards when to make a ruling on the objection. No hard and fast rule can and should be laid to fetter the Court's discretion. The exercise of the discretion must, in my view, depend on the facts and circumstances of each case."

The Supreme Court in that case quoted excerpts from an earlier precedent where Mulenga JSC had observed, "The court has option. It may or may not hear the point of law before the hearing. It may dispose of the point before, at or after hearing and it may or may not dismiss the suit or make any order it deems just. I would therefore not hold a court to be in error, which opts to hear a preliminary objection but postpones its decision to be incorporated in its final judgment, unless it is shown that material prejudice was thereby caused to either party; or that the decision was reached at unjudicially." (Emphasis is mine.)

It is therefore this court's view that where the issue is of mixed law and fact, and the determination thereof would require evidence, then the issue cannot be tried as a preliminary issue. See: Ramdayal Umraomal Vs. Pannalal Jagannathji, AR 1979 153, at p.157. Courts therefore do exercise discretion in the matter.

On the propriety of the present application, the correct provision for bringing an application for resolution on a preliminary point of law, as noted, is Order 6 rule 28 of the CPR. It reads,

"Any party shall be entitled to raise by his or her pleading any point of law, and any point so raised shall be disposed of by the court at or after the hearing; except that by consent of the parties, or by order of the court on the application of either party, a point of law may be set down for hearing and disposed of at any time before the hearing."

In discussing the import of the above provision, the Supreme Court in Attorney General Vs. Maj. General David Tinyefuza, SC Constitutional Appeal No.1 of 1997, cited with approval Everett Vs. Ribands, where Rommer LJ observed,

"I should have thought this was the very class in which an application ought to have been made under order 25 rule 2 to have the point determined before the hearing so as to save all discovery of documents, the collecting together of witnesses and so on, and have the question decided at very early stage. I think where you have a point of law which, if decided one way, is going to be decisive of litigation, then advantage ought to be taken of the facilities afforded by the rules of court to have it disposed at the close of the pleadings or very shortly after the close of the pleadings.'

In our context, the facilities is afforded by O.6 rule 28 of the CPR, and not O.15 rule 2. The former creates an entitlement to raise a point of law by pleading. O.15 rule 2 CPR is therefore not applicable for the purposes of moving court, as it happened in the instant matter. That said, it is the view of court that the invocation of a wrong law does not necessarily vitiate a proceeding, provided relevant provisions exist, which support the action taken, and I find that this is the case here. See: **Ariko Johhny De West Vs. Omara Yuventine & Electoral Commission, Election Petition Appeal No. 41 of 2021**;

I now proceed to consider the application on merit.

I have considered the pleadings before me. I have also considered the principles that courts have laid down over the years, for the proper application of section 7 of the Civil Procedure Act. Both learned counsel cited several authorities. I need not repeat them. From the address of learned counsel, they all seem to have a convergence of minds on some principles, which have been satisfied, but not all. They for instance agree that there was a former suit before the LC II Court of For God Parish, Bar-Dege Division. They agree that in the proceedings before that court, the present parties to civil suit No.13 of 2021 were the same. They also agree that the court was competent and heard and decided the matters in controversy in that suit. The divergence however comes to the issue of

whether the matter in issue before the LC II Court is now the matter directly and substantially in issue in the present headsuit.

For the Applicant, it was argued that the entire suit land was the subject matter of adjudication before the LCII Court. The Respondent disagrees, contending that, the earlier matter involved only four acres of land which the applicant was in occupation of, and that the court simply confirmed the applicant's ownership and maintained the status quo, meaning he was to remain on his portion of land and to continue using as he pleases.

On the other hand, the Applicant argued that, the Respondent was evicted from the entire land, the same having been adjudged to be the Applicant's. This averment and submission, in court's view, appear to be at variance with the record of the proceedings placed before court. First, there is no proof of execution by way of eviction and giving of vacant possession of any land to the Applicant by any execution court. What is apparent is that, the order of the LCII Court simply declared the applicant's position as the rightful owner of land and he was to remain where he was. I therefore see no merit in the argument that some eviction had to happen so as to put the applicant in possession of land. The question that arises is: Which court ordered for the Respondent's eviction, and pursuant to what order? There is no answer for the moment, and the applicant has not addressed

these anywhere in the application before me. The Written Statement of Defence does not address it either.

Second, a perusal of the pleadings and the attachments reveal that, the LCII Court communicated to the Chief Magistrate vide annexure "F1"and "F2" to the affidavit of the Respondent, dated 26 January, 2010, and 27 January, 2010, respectively, that, the land in dispute before the LCII court were four acres, and that the court's adjudication was restricted to the four acres. The LCII Court then clarified to the Chief Magistrate court that, the Respondent had been using 47.9 acres of land, which was not the subject of the dispute before the LCII court. These letters are also pleaded in the Applicant's Written Statement of Defence, although the applicant contests their authenticity, contending, they are forged. In his written statement of defence, the applicant (defendant) avers that the respondent (plaintiff) is acting fraudulently to deprive the applicant of his land. Under the particulars of fraud, the applicant avers "forging letters purportedly from the local leaders of the area to the Chief Magistrate"; "forging that the lower court judgment was only four acres (sic)."

Court further notes the averment in the plaint that the cause of action is in trespass to 57 acres of land. It is however not clear to court what the exact acreage of the disputed land is, as the impugned LC II letters put it at 47.9, yet the respondent puts it at 57 acres.

The question that comes to mind, therefore, is whether the plea of res judicata is capable of being resolved vide the present application, and in light of the material before court. Before I answer this question, I proceed to explain a bit about the plea.

Res judicata means a matter adjudicated upon or a matter upon which judgment has been pronounced. Section 7 of the Civil Procedure Act (CPA) contains the rule of the conclusiveness of the judgment. It is based on the maxim of the Roman jurisprudence *'interest reipublicae ut sit finis litium'* (it concerns the state that there be an end to law suits) and, partly on the maxim ' *Nemo debet bis vexari pro una at eadem causa'* (no man should be vexed twice over for the same cause.)

Thus, put differently, every suit must be sustained by a cause of action and there is no cause of action to sustain the second suit since it is being merged in the judgment of the first. See: King Vs. Hoare (1844) 13 M&W 494, at 504; Kendall Vs. Hamilton (1879) LR 4 AC 504, at 526.

The rule is based on public policy which requires that there should be an end to litigation. Thus the question whether the first decision is correct or erroneous has no bearing on the question whether it operates or does not operate as res judicata. See: Tarini Charan Vs. Kedar Nath (1928) 33 CWN 126, AIR Cal 777 (FB); Mohanlal Vs. Benoy Krishna 1953 SCR 377. The

rationale of the foregoing is that, every erroneous decision would be litigated again to get another opinion, and there would be no finality: See: Behari Vs. Majid (1901) I LR 24 All 138.

Res judicata is not a pure question of law, but a mixed question of fact and law. It has to be specifically pleaded and the person relying on it should place before court, all material particulars which would be sufficient to give a finding whether the particular case is barred by res judicata. See: Krishna Chand Nayak Vs. Neela Kanthi Mohanti, AIR 1996 ori 1.

Once successful, the plea of res judicata prohibits the court from entering into an inquiry at all, as to a matter already adjudicated upon. In other words, res judicata prohibits an inquiry in *limine.* Thus, an issue of fact may be res judicata, but, this is not so where in the subsequent suit, altered circumstances are pleaded. See: Mangharan Chuharmel Vs. BC Patel (1972) I LR Born 30.

Finally, on res judicata, it is the competency of the trial court which determined the 'former' 'suit' that must be looked to, and not that of the appellate court in which that suit was ultimately decided on appeal, or of executing court. See: Toponidhee Vs. Sreeputty (1880) I LR 5 Cal 832; Bharasi Vs. Sarat Chunder (1896) I LR 23 Cal 415; Official Asignee of Madras Vs. Aiyu Dikshithar (1925) 48 Mad LJ 530.

Turning to the question earlier posed, the answer seems to me to be found in the binding wisdom of the Supreme Court of Uganda in Mansukhlal Ramji Karia & another Vs. Attorney General, Civil Appeal No. 20 of 2002, where Tsekooko, JSC, stated

"Here the learned judge relied on only the pleadings and submissions of counsel for both sides and the judgment of the Court of Appeal in Civil Appeal No. 36 of 1996 for the view that the suit land was res judicata. There was no evidence to show any relationship between the appellants and the parties in that appeal. 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 between the same parties, or parties through whom they claim." (Underlining is supplied for emphasis.)

In the present matter, the situation obtaining is that, there is a contest as to the extent of the land that was in issue before the LC11 Court. The Judgment of that Court is silent on the matter, but that court, by the impugned communication, offered some explanation that 47.9 acres of land was not adjudicated upon by it. With respect, I am unable to comment on the truthfulness or otherwise of the communication, until after receiving evidence from the parties in the matter. Therefore, whereas the

plea of res judicata, if successful, would be capable of disposing of the suit, I find it proper, on the contested facts, to try the issue of facts first, along with other issues, and conclusively resolve the issue of res judicata in the final judgment of court, in civil suit No. 13 of 2021.

I am further bolstered in my conclusion by the statement of Sir Charles Newbold (President of the Court then) in the oft cited case of Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd [1969] EA 696, at p. 701 thus,

"A preliminary objection is in the nature of what used to be called a demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion." (Underlining is supplied.)

In light of the foregoing analysis and observations, it is my considered view that, the desired short cut, as is common with preliminary objections, may in the end turn out to be a longer route to resolving civil suit no. 13 of 2021, if court acceded to the applicant's invitation to decide the question now. Accordingly, I disallow the application. Issue one is accordingly resolved in the negative. On issue two, since I am unable to resolve the issue of res judicata now, I therefore postpone the determination of the

issue until after recording evidence, if parties decide to canvass the issue at the trial of the head suit.

On costs, given my decision above, costs of the application shall abide the outcome of the trial of civil suit No. 013 of 2021.

It is so ordered.

Delivered, dated and signed in chambers this 10th day of October, 2022.

10.10.2022

George Okello
JUDGE HIGH COURT

Ruling read in chambers in:

The Presence of the Respondent.

Counsel for the Respondent, Mr. Ndhego Muzamiru absent.

The Applicant, and counsel Otto-Gulamali absent.

Ms. Grace Avola, Court clerk.

10.10.2022

Judge.

10.10.2022