**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA HOLDEN AT MUKONO**

**MISCELLANEOUS APPLICATION NO. 0580 OF 2021**

**(ARISING FROM CIVIL SUIT NO. 161 OF 2018)**

**ROBINAH NAMAKULA MASINDE ..... APPLICANT**

**VERSUS**

**MATSIKO SAM .....RESPONDENT**

**BEFORE HON. LADY JUSTICE FLORENCE NAKACHWA**

**RULING**

Background

1. This is a ruling on a preliminary objection raised by Counsel for the 1st Defendant brought by Notice of Motion that this suit is res *judicata*, that the Respondent has no *locus standi* to sue the Applicant who is the registered proprietor of the suit land and that Civil Suit No. 161 of 2018 is an abuse of court's process and that the said civil suit is frivolous and vexatious. Submissions were filed in support, against, in rejoinder and in sur'rejoinder of the application.

2. The genesis of this matter dates back to High Court Civil Appeal No. 01 of 2012 where the Applicant successfully appealed against Asa Willis Masinde. The appeal was arising from Divorce Cause No 24 of

2008. In the appeal, Hon. Lady Justice Kiggundu Jane F.B. ordered that land comprised in Block 107 Plot 1997 being part of what was initially Block 107 Plot 740 sold by Asa Willis Masinde be brought back in the family bracket and shared equally between the parties. In execution of the decree of the said appeal, the subject Block was sub-divided and the Applicant was given Block 107 Plots 2621 and 2413 as her share.

3. The Respondent on the other hand claimed to have bought the subject Plots from one James Africa Byekwaso on 12/12/2014 and 03/09/2012, respectively. James Africa Byekwaso purchased the plots from Asa Willis Masinde, the Applicant's former husband. He claimed to have filed Civil Suit No. 32 of 2016 against the Applicant in the Chief Magistrate's Court of Mukono for trespass on the suit land. That the Applicant filed a Written Statement of Defence and a counter claim wherein she sought for cancellation of his Certificates of Titles for the suit land comprised in Block 107 Plots 2412, 2413 and 2621 at Nakabago, Mukono.

4. While the suit was pending in the said Magistrate's Court, the Applicant through her lawyers wrote a letter dated 4th May 2017, to the Registrar of High Court, Mukono seeking transfer of Civil Suit No. 32 of 2016 to the High Court of Uganda at Mukono on ground that the Chief Magistrate's Court has no jurisdiction to cancel Certificates of Titles. The suit was subsequently transferred to the High Court, Mukono and a new file number allocated as HCCS No. 161 of 2018.

**5.** At the hearing of this application on the 30th May, 2022, the Applicant was represented by Counsel Erick Muhwezi and Counsel Atwine Muhwezi of M/s The Muhwezi Law Chambers while the Respondent was represented by Counsel Beinomugisha Charles of REM Advocates. Both Counsel filed written submissions with authorities which are considered in this ruling.

**Issues**

**(1) Whether the Plaintiff's suit vide Civil Suit No. 161 of 2018 is barred by *res judicata* and is an abuse of the court process, frivolous and vexatious.**

**(2) Whether the Plaintiff / Respondent has no *locus standi* to institute Civil Suit No. 161 of 2018.**

**Issue 1: Whether the Plaintiff's suit vide Civil Suit No. 161 of 2018 is barred by *res judicata* and is an abuse of the court process, frivolous and vexatious.**

The Applicant contended that the case that has been brought by the Plaintiff / Respondent is *res judicata*. Counsel cited the law on *res judicata* as Section 7 of the Civil Procedure Act, Cap. 71 which provides that:

> *"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 had been heard and finally decided by the court."*

6. Counsel relied on the case of **Saroji Gandesha Vs Transroad Ltd. SCCA 13 of 2009**, where Justice Bashaija K. Andrew held that:

> *"I have had the benefit of fully appraising myself with the judgment and decree in C.S 85 of 2005, ..... the High Court in the said judgment cancelled and revoked the Applicant's certificate of titles..... The decree evidently affected even 3rd parties including the Applicant and they were bound by the orders of the court in the suit. Thus it would be futile to argue that the Applicant is not bound by the judgment just because he was not party to the suit".*

7. On whether the case is frivolous and vexatious, Counsel for the Applicant cited the case of **Ndugo Seti and others Vs Sekiziyivu Sammy Jones HCCS 286 of 2011**, where court stated that:
*"the term Frivolous as per the Black's Law Dictionary 8th Edition pg. 629 as lacking a legal basis or legal merit; not serious and not reasonably purposeful. He also defined a vexatious suit as a law suit instituted maliciously and without good cause. R Vs Ajit Singh s/o Vir Singh [1957] EA 822... "Frivolous" connotes the absence of seriousness or the lack of validity or legitimacy. A frivolous pleading would also be vexatious in that its effect would be counterproductive. See Re Singapore Souvenir Industry (Pte) Ltd [1985-1986] SLR(S) 161.*

*Secondly, the case is also "Vexatious" i.e it is oppressive to the opposing party and it obstructs the court from gaining a full understanding of the issues and a party acts with an ulterior motive. The action is vexatious if the party bringing it is not acting bona fide and merely wishes to annoy or embarrass the opponent or when it is not calculated to lead to any practical result. See Lehman Brothers Special Financing INC V Hartadi Angkosubroto [1998] 3 SLR(R) 664: Goh Koon Suan V Heng Gek Kiau [1990] SLR(R) 750".*

8. Counsel submitted that for as long as the Applicant is the registered proprietor of the suit land by virtue of a valid court order and in uninterrupted possession which court can see on *locus* visit, she cannot be a trespasser on it and be said to illegally own the land. That the Respondent has never even occupied the suit land. He only had it transferred into his names in cohorts with a one Byekwaso Africa and Asa Willis Masinde and that the judge in Civil Appeal No. 01 of 2012 noticed this.

9. The Respondent's Counsel through the Respondent's written submission in reply and submissions in sur'rejoinder, contended that the point of law must be determined by court purely on points of law by looking at parties' pleadings. He relied on the case of **Mukisa Vs Western Distributors [1969] EA 696**, where it was held that a preliminary objection can only be determined on the pleadings and not on evidence. If the preliminary objection cannot be determined on pleadings only, it means the preliminary objection cannot be disposed

off without hearing evidence or giving parties an opportunity to adduce evidence.

10. It is the Respondent's contention that the objections raised cannot be sufficiently determined without hearing the parties' *viva voce*. That both parties claimed to be in possession of certificates of titles yet the search report dated 22/2/2022 confirms that the Respondent is still the registered proprietor of the suit land. Counsel attached the original certificate of title certified on the 10/6/2022 which further indicates that the Respondent is still the registered proprietor of the suit land.

**11.** The Respondent's counsel further averred that for the defence of *res judicata* to succeed the following facts must exist as held in the case of **Onzia Elizabeth Vs Shaban Fadul as legal representative of Khemis Civil Appeal No. 0019/2013:**

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

12. Counsel further cited the case of **Boutique Shazim Ltd Vs Norattan Bhatia & Anor, Civil Appeal No. 36 of 2007,** where court held that:

*"essentially the test to be applied by court to determine the question of res judicata is this; is the plaintiff in the second suit or subsequent action trying to bring before the court, in another way and in the form of a new cause of action which he or she has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon? If the answer is in the affirmative, the plea of res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which belongs to the subject matter of litigation and which the parties or their privies exercising reasonable diligence might have brought forward at the same time".*

13. Counsel submitted that the Applicant has not led evidence to prove that: i) there was a former suit between her and the Respondent; ii) the parties in the former suit are the same as in the present suit; iii) the Respondent is trying to bring similar dispute earlier decided or a subsequent suit in another form of cause of action and iv) the issue of ownership for land comprised in Block 107 Plots 2621 and 2413 between her and the Respondent has ever been determined.

14. Counsel asserted that there has never been a final determination of proprietorship for Plots 2621 and 2413 between the Applicant and the Respondent.

15. As regards the suit being frivolous and vexatious, Counsel for the Respondent submitted that the Respondent disclosed a cause of action in Civil Suit No. 161/2018 and that he has *locus* to sue the

Applicant in that suit hence the suit is not frivolous and vexatious as alleged in this application. Counsel cited the case of **Kapeka Coffee Works Ltd v. NPART CACA No. 3/2000**, where it was held that in determining whether a plaint discloses a cause of action, the court must look at the plaint and its annexures if any and nowhere else.

16. The Respondent's counsel contended that in order to prove that there is a cause of action, the plaint must show that the plaintiff enjoyed a right; that the right has been violated; and that the Defendant is liable. If the three elements are present, a cause of action is disclosed and any defect or omission can be put right by amendment. That the Plaintiff in Civil Suit No. 161 of 2018 in his plaint disclosed the cause of action that he enjoyed a right of ownership of property granted to him under Article 26 of the Constitution of the Republic of Uganda, 1995 as amended, that the same right was violated by the Defendant in the same Civil Suit for trespass on his land without his consent and hence she is liable for the trespass.

**The Court's Resolution**

17. The defence of res-judicata is contained in section 7 of the Civil Procedure Act, Cap. 71, which is re-stated here thus:

> *"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 had been heard and finally decided by the court."*

18. *Res judicata* is a Latin expression or term that means matter once adjudicated, cannot be re-adjudicated. The doctrine technically means that where a matter in issue has already been tried by a competent court, then trial between the same parties in respect of the same matter shall not be allowed. It is a fundamental doctrine of all courts that there must be an end of litigation.

19. In **Halsbury's Laws of England, 4th Edition Reissue (1992) Vol 16 paragraph 975 at pages 860 - 861** the essentials of res judicata are stated thus:

*"In order that a defence of res judicata may succeed it is necessary to show not only that the cause of action was the same but also that the Plaintiff has had an opportunity of recovering and but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of res judicata must show either an actual merger, or that the same point has been actually decided between the parties. Where the former judgment has been for the defendant, the conditions necessary to estop the Plaintiff are not less stringent. It is not enough that the matter alleged to be estopped might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it actually was so put in issue or claimed. .....the doctrine applies to all matters which*

*existed at the time of the giving of the judgment and which the party had an opportunity of brining before the court. If however, there is matter subsequent which could not be brought before the court at the time, the party is not estopped from raising it."*

20. In **Townsend v. Bishop (1939) 1 K.B. 805** the Plaintiff, who was the driver of a motor car belonging to his father, claimed damages for personal injuries sustained by reason of a collision between that car and a motor lorry. The claim was based on the negligent driving of the lorry and the defence was that of contributory negligence. The father claimed damages in the previous action against the present defendant for damage to the motor car, and the action was founded on the same alleged negligence of the defendant and the defence relied on was a plea of contributory negligence in the same terms as those in the present action. That action was duly tried and judgment given. It was contended that the doctrine of res judicata applied in this action, as in driving the car, the son was acting as his father's agent. It was held that as the present action was not one between the same parties as those in the earlier action, the plea of estoppel failed, although the negligence and contributory action were the same.

21. In **W v. W (1953) 2 All E.R. 1013** the husband filed for divorce alleging that the wife had committed adultery with the co-respondent on occasions on and after April 21 1947. He further alleged: "That on Dec. 11, 1946, the [wife] gave birth to a child [A], the paternity of which is not admitted." The wife entered an appearance, but filed no answer. The co-respondent defended the suit and called the wife as a witness,

but she was asked no questions as to the paternity of the child. On May 10, 1950, the husband was granted a decree nisi. By a summons dated June 15, 1950, the wife applied for an award for maintenance for herself and the child A. The husband, by affidavit, denied that he was the father, and on Oct. 31, 1950, an order was made for the trial of the issue as to paternity with leave for the husband to raise a plea of res judicata. At pages 1014 - 1015, Barnard J. said:

> *"I fail to see how one could possibly say that this issue of paternity is res judicata. There has never been any issue before court as to the legitimacy of this child. The only issue as between the husband and wife in the divorce suit was whether or not the wife had committed adultery. There is no allegation in the petition that the co-respondent is the father of the child. There is not even a definite allegation that the husband is not the father of the child himself. ..... There is no order yet for custody of this child and the question is in issue. I am satisfied that this case does not in any way come within that decision and the matter is not res judicata."*

22. The above authorities are relevant in the instant case. Further in the East African Court of Justice case of **James Katabazi & 21 Others v. Secretary General of the East African Community & Anor, Reference No. 1 of 2007**, the court held on *res judicata* thus;

> *"Three situations appear to us to be essential for the doctrine to apply: One, the matter must be "directly and substantially in issue in the two suits. Two, parties must be the same or parties under whom any of them claim litigating under the same title. Lastly, the*



*matter was finally decided in the previous suit. All the three situations must be available for the doctrine of res judicata to operate."*

23. Further, in **Yahaya Walusimbi Vs Justine Nakalanzi & 3 others, HCMA No. 1942 of 2020, Hon. Lady Justice Olive Kazaarwe Mukwaya** held at page 3 that;

*"For a claim of res judicata to succeed, the Defendant must prove that; i. the same parties litigating in the former suit should be the same parties litigating in the latter suit or parties under whom they or any of them claim. ii. a final decision on the merits has been given in the former suit by a competent court. iii. the suit or its subject matter must have been directly or substantially in issue in a former suit. iv. the parties should be litigating under the same title. v. the earlier suit must have been decided by a competent court and that court fully resolved the dispute."*

24. Generally, the law discourages re-litigation of the same issues except by means of an appeal. It is not in the interest of justice that there should be re-trial of a case which has already been decided by another court which may lead to the possibility of conflicting judicial decisions. There is a danger not only of unfairness to the parties concerned, but also of bringing the administration of justice into disrepute. In my judgment, the rationale of applying the doctrine of res judicata is to prevent multiplicity of suits and bring finality to litigation. It also avoids case backlog and a habit of forum-shopping by litigants.

The latter wastes court's time and is tantamount to abuse of court process.

25. However, in the present case, the parties are not the same and cannot be said to litigate under the same title in Civil Appeal No. 1 of 2012 and Civil Suit No. 161 of 2018. Secondly, while in Civil Appeal No. 1 of 2012, the issue was whether land comprised in Block 107 Plot 1997 initially Block 107 Plot 740 formed part of matrimonial property which should be put in the family basket and shared between the divorce parties, in Civil Suit No 161 0f 2018, which is the subject of this application, the issue is who owns the suit land as between the Applicant / 1st Defendant and the Respondent / Plaintiff. Thirdly, the parties in Civil Appeal No 1 of 2012 were Robinah Namakula Masinde (the Applicant) versus Asa Willis Masinde (Applicant's former husband) where one of the grounds of appeal was on the sharing of property upon divorce. The Respondent was not a party to that appeal and neither was he a party in the Divorce Cause No. 24 of 2008 at Mengo Chief Magistrate's Court from which the appeal arose.

In Civil Appeal No 1 of 2012, Hon Lady Justice Jane Kiggundu stated at page 26 of the judgment thus:

*"Land comprised in Block 107 Plot 1997- this being part of what was initially Block 107 Plot 740 sold by the respondent, this court orders that the entire Block 107 Plot 740 must be brought back in the family basket and shared equally."*

Fourthly, the Respondent's rights, if any, and remedies available, were not discussed in the previous cases.

26. In my judgment, since the Respondent was not a party to the earlier cases between the divorced parties, he is not estopped from filing the current suit. Therefore, res judicata would not apply to Civil Suit No. 161 of 2018. I agree with the Respondent's counsel that since there is a dispute as to ownership of the suit property, there is need for this court to determine the rightful proprietor of the suit land; that is, whether it is the Applicant or the Respondent and the remedies available to the parties. It is also crucial to sort the confusion in the Land Registry where parties have different titles over the same piece of land, hence the involvement of the second defendant (Commissioner Land Registration) in Civil Suit No 161 0f 2018. Therefore, the suit is not an abuse of court process, frivolous and vexatious as claimed by the Applicant.

27. **Issue 2: Whether the Plaintiff / Respondent has no *locus standi* to institute Civil Suit No. 161 of 2018.**

The Applicant submitted that she is the registered proprietor of the suit land and her interest is derived from a decree of the court in HCCA No. 01 of 2012. That the said judgment is to-date valid and binding to the whole world including the Respondent.

28. Counsel for the Respondent in reply submitted that the Respondent first instituted Civil Suit No. 32/2016 against the Applicant

for trespass. That the matter was transferred to High Court and registered as HCCS No. 161 of 2018. That the Respondent was the registered proprietor of Block 107 Plots 2621 and 2413 which were registered in his names on 24th/09/2012 and 22nd/10/2015, respectively.

29. According to **Mozley & Whiteley's Law Dictionary, 11th Edition**, at page 161, '*locus standi*' means "a right of appearance in a court of justice, or before Parliament. In other words, it means a right to be heard as opposed to a right to be heard on the merits".

30. The determinant of the existence or otherwise of *locus standi and* the test to be applied is the requirement of sufficient interest in the subject matter of litigation, with the consequence that a person without sufficient interest in the subject matter of litigation cannot be heard. The principles of *locus standi* have the function of determining which interests merit access to the court and protect public bodies from vexatious litigants with no real interest in the outcome of the case but just with a desire to make things difficult for the government. Other reasons are

(a) to prevent the conduct of government business being hampered and delayed by excessive litigations;

(b) to reduce the risk that civil servants will behave in over-cautious and unhelpful ways in dealing with citizens for fear of being sued if things go wrong;

(c) to ration scarce judicial resources; and

(d)to ensure that the argument on the merits is presented in the best possible way by a person with a real interest in presenting it and to ensure that people do not meddle in the affairs of others.

Therefore, a litigant must have a personal interest in the outcome of a case.

31. Having perused the Respondent's pleading in the main suit, he sought, among others, a declaration that he is the lawful owner of the suit property comprised in Block 107 Plots 2621 and 2413 fraudulently registered in the names of the Applicant / 1st Defendant and a declaration that the Applicant / 1st Defendant is a trespasser on the suit land. From the above averments in the plaint, I can conclude that he has sufficient interest in the land in dispute to confer upon him *locus standi* to protect his claimed interest, if any, in the land by way of a suit. Consequently, I find that the Respondent has *locus standi* to institute Civil Suit No. 161 of 2018.

32. Pursuant to the foregoing analysis, I find that this application lacks merits and is hereby dismissed with costs to the Respondent.

I so order.

This ruling is delivered this 29th day of August 2022 by

**FLORENCE NAKACHWA**

**JUDGE.**

*In the presence of:*

*(1) Counsel Atwine Muhwezi from M/s The Muhwezi Law Chambers Advocates for the Applicant;*

*(2) Counsel Beinomugisha Charles from M/s REM Advocates for the Respondent;*

*(3) Ms Robinah Namakula Masinde, the Applicant;*

*(4) Mr. Matsiko Sam, the Respondent;*

*(5) Ms Pauline Nakavuma, Court Clerk.*