

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

**CIVIL APPEAL NO. 0020 OF 2009**

**AJUGA JOHN BOSCO** \_\_\_\_\_ **APPELLANT**

**=VERSUS=**

**MARIAM MUSA DOKA** \_\_\_\_\_ **RESPONDENT**

**JUDGMENT**  
**BEFORE HON. JUSTICE NYANZI YASIN**

***BACKGROUND OF THE APPEAL***

1. In the court below the plaintiff and the defendant disputed over a similar piece of land each of them claiming to have inherited it from their parents and having stayed for long on it.
2. According to the plaint the plaintiff got disturbance over the suit land from the defendant in 1994. The matter was taken to L.C.I Court which found in favour of the plaintiff thought his particular pleading was not later supported by evidence.

- In the period of time the plaintiff did state her son was constructing a house/hut on the suit land and the defendant stopped him. At that point the plaintiff decided to start this action in the court below.
3. She sought a declaration that the land belongs to her, an order for vacant possession, a permanent injunction and costs of the suit. The defendant did not agree with those claims. He filed a written statement of defence and denied all of them. He accused the plaintiff of being a refugee from Sudan. He pleaded that his family had been on the land all their lives and buried their relatives on it, that he belonged to them as descendants from Palanya clan.
  4. At the trial both party were not represented. Court conducted a full inter-party trial including a visit to the locus in quo. Court framed only two issues for determination, those issues were;-
    - 1) **Whether the plaintiff has interest in the suit land.**
    - 2) **Remedies to the parties.**
  5. However relevant to this appeal the defendant together with his witness kept referring to the suit between SAID DOKA and the defendant that was decided in the favour of the defendant. SAID DOKA appeared to be a brother of MARIAM DOKA. From the records on file the suit was LAND CLAIM NO. 0017/2005 between SAID DOKA –VS- AJUGA JOHN BOSCO, GOBOA KWIRINGO and VUDRIKO ANDREW.
  6. After conducting the hearing HW JAMES EREEMYE found in favour of the plaintiff on 30/06/2009 and declared that the suit land belongs to her. She was given an order of vacant possession and order of permanent injunction shs. 4.000.000/= as general (though the

plaint never pleaded any prayer for general damages) with interest of 6% and costs of the suit.

7. That decision aggrieved the defendant who filed his appeal in this court on 06/07/2009 as the appellant now against Mariam Doko as the respondent. He filed the memorandum of appeal by himself. Being drafted by a lay person, it never conformed to the rules of Civil Procedure which is not only understandable but would also be excusable. It raised what I can term as five points not grounds. If all the five points are ready for gather they make one ground of appeal that is to say

*“That the trial Magistrate erred in law and procedure when he tried and determined a suit which he had been notified was res judicate”*

That is the best I can understand from the complaint in the grounds raised by the appellant.

8. At the hearing of this appeal the record showed both parties got services of learned advocates. Mr. Samuel Ondoma appeared for the respondents while initially Augustine Alule acted for the appellants. When Mr. Alule became a Magistrate the record showed Mr. AKILE SUNDAY replaced him for the appellants unfortunately he too Akile never amended the lay memorandum of appeal either to improve its language or include other grounds.
9. The two advocates showed further not being committed to this case when they agreed before court on 14/10/2012 to file written submission so that judgment is delivered but never complied until when court decided to proceed with the judgment without submission. Consequently only one ground of appeal will be decided.

10. The ground as rephrased by court may read  
*“That the trial Magistrate erred in law and procedure when he tried and determined a suit which he had been notified was res judicate”.*
11. I stated earlier that this court received no written submissions from the learned advocates of both sides. In this judgment on appeal court will consider the record of proceedings together with the judgment of the lower court in relation to law relating to the doctrine of res judicata upon which the appeal is based.
12. There record showed on a good number of occasions where witnesses referred to an earlier suit. For purposes of clarity those instances will be reproduced in this judgment.

- i). PW1 at page 1 of the record of proceedings stated  
*“When you sued my brother I was a witness and that is why he won the case. The case went against you..... I am not said and said is not me.*

The correct position however is that is SAID who sued the defendant/appellant. That statement was made by Mariam Doka the respondent.

- ii). DW1 the appellant at page 10 of the proceedings stated;-  
*“I came to realize the problem when the plaintiff’s brother filed a suit against us which was ended in court. I later was sued over the same piece of land”*

At page 11 under courts exam DW1 added  
*“I had a case with SAID in court that I was trespassing on his land. The matter was heard in court and evidence is on record”.*

- iii). DW3 Karamelo Oduni at page 13 of the record stated;  
*“Said was not satisfied and sued Ajuga in the court again. And it was the 3<sup>rd</sup> time. But in court again the case was ruled against SAID who was advised to appeal in 14 days from that time SAID disappeared and Doka here was a witness. Now the plaintiff claims the land is different but it is the same land”*
- iv). DW4 Elivira Lindrio at page 16 of the record of proceedings stated as below;  
*“.....SAID claimed the land was his and sued Ajuga before the court. The court even visited the locus after hearing the case in favour of Ajuga and said left then Mariam Doka decided to heap potatoes in this land.....”*
13. Despite all that evidence the trial court did not frame an issue to be answered as to whether the suit brought by Mariam Doka, a sister of Said Doka was the same suit over the same piece of land and could be res judicata.
14. Parties being unrepresented at that level it was the duty of the trial court to investigate the claims by the defendant/appellant. Court would among other things have asked the parties to tender in evidence the documents they had relating to the earlier suit and study them or on its own motion call for the earlier case. Nothing of the kind was done.
15. Nevertheless the trial court went ahead to express its position on this issue. In his judgment at page 29 H/W JAMES EREEMYE discussed the issue of an earlier case and express his opinion. I will reproduce the relevant part of the judgment at page 26;

*“That before the local council court, it was ruled that if a person has lived on the land for more than 12 years he should not be chased. So Saidi should allow Ajuga to remain on the land. This piece of evidence can only be interpreted to mean that the land belonged to Said BUT because Ajuga.....had lived thereon for 12 years undisturbed/unchallenged then can not be evicted. According to the law this therefore meant Ajuga had become a bonafide tenant or lawful tenant/occupant. DW3 said Saidi was not satisfied with the local council court ruling that **he filed a suit in the Magistrate court against Ajuga and the plaintiff was a witness.***

***That court also ruled in favour of Ajuga based on the same legal principles, the question here is did the ruling, based on that principle mean that the land was for Ajuga or Saidi. Ajuga was only a bonafide or lawful occupant. To me I think the land remained for Saidi who could not only evict Ajuga by reason of bonafide or lawful occupancy (emphasis added)***

16. I have added emphasis on the whole of the part of the judgment which relates to the trial court’s reasoning. It presents three basic problems
- It is not understandable how the trial court discussed a judgment of the other court when the same was not tendered before it.
  - Secondly by so doing giving effect and views on the judgment of the same court the trial court turned itself into an appellate court. Actually he observed that for him he thought the land belonged to Saidi and not Ajuga as court had held.

- The last which I need not discuss is his conclusion that Saidi could not evict Ajuga for the only reason that he was lawful and bonafide occupant is contrary to the law.
- Lastly there could not be lawful or bonafide occupants on land which is not proved to have been registered. See section 29 of the land Act Cap. 227. None of the situations the section provides could have applied.

#### S.7 Civil Procedure Act

*“No court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties or between the parties under whom they or any of them claim, litigating under the same title in a competent court to try the subsequent suit or a suit in which the issue has been subsequently raised and has been heard and finally decided by that court”*

17. All that kind of misdirection would have been avoided if the trial court had framed an issue relating to whether according to the evidence it had received or it would further investigate and receive the case before it was res judicate.
18. S.7 of the Civil Procedure Act provides for the rule of res judicate. For purpose of emphasis and clarity I will reproduce **explanation 6** to section S.7 of the Civil Procedure Act.

#### **Explanation 6**

Where persons litigate bonafide in respect of a public right or **private right claimed in common for themselves and others all persons interested in that right** shall for the purposes of

this section, be deemed to claim under the persons so litigating.  
(emphasis added)

19. At this stage I am not faulting the trial court for having not found that the matter was res judicata but for the arriving at a decision he reached without evidence or sufficient facts before him.
20. Courts have been strict with this rule of res judicate in defining what it is its effect. In **H.OCHAYA –VS- PETER OGWANG 1976 HCB 33 ALLEN J** – referring to the rule in the M.C.A held;
  - 1) By virtue of S.221 (now S.210 M.C.A) a suit which has been disposed of by the court between the same parties is resjudicata and should never re-appear before courts.
  - 2) If no appeal is filed against the decision where the 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.
21. In **HCCS No. 353 OF 1966 KARSHE =VS= UGANDA TRANSPORT LTD** Sir Udo Udoma C.J held as below  
“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 on the same issue again or deny that a decision had in fact been given subject to certain conditions”.
22. In **SC C.A. No. 2/2002 MANSUKHAL KARIA =VS= AG & 2 ORS TSEKOOKO** JSC gave the conditions that must be examined to conclude that a matter is res judicate he later gave the best way of approaching cases which involve that issue the conditions are;-
  - 1) That issue has been a former suit or issue decided by a competent court.

- 2) That the matter in dispute 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.
  - 3) The parties in the former suit should be the same parties or parties under whom they claim or any of them claim, litigating under the same rule.
23. In the present case the dispute concerned and where both parties claimed the land belonged to their parents. Evidence was led where it was established that there was a suit where Said Doka claiming under his parent sued the appellant. Yet another suit came up where Mariam Doka a sister of Saidi Doka sued the appellant.
24. In **KARIA =V= A.G.** (Supra) Justice Tsekooko gave the best procedure to adopt if the doctrine is pleaded or arises as a matter of evidence. His guide ran as below;
- “Here the learned trial Judge relied on only the pleadings and submission of counsel for both sides and the judgment of court in civil appeal No. 36 of 1996 for the view that the suit was resjudicata. There was no evidence to show the 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 it 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”*** (emphasis added)
25. Using that guideline the trial court had to frame and decide the issue or res judicata upon receiving evidence the trial court was therefore

- with respect in error when it formed its opinion on the former suit without first receiving evidence about it to decide if it was within the ambit of S.210 M.C.A or S.7 of the Civil Procedure Act. For those reason the only ground of this appeal succeeds.
26. It has been held that where court finds that the matter is resjudicata there is no option but to dismiss the subsequent suit. See **SEMAKULA –VS- SUSANE MAGALA & ORS [1979] HBC 90** with that kind of implication to the whole case this case is remitted to the Magistrate court for re – trial of the issue of res judicata. The re-trial court should call for the record in **LAND CLAIM APPLICATION NO. 17/2007 between SAID DOKA AND AJUGA JOHN BOSCO WITH 3 OTHERS** to decide the issue. The court should receive all the necessary evidence related to the relationship between the parties to both suit and the persons under whom they claim.
27. As the appellant did not raise any other grounds of appeal if the re – trial court finds that the case from which this appeal arises was res judicata it will then be dismissed if it finds the otherwise the finds of the lower court will remain since they were not appealed from.
28. This appeal succeeds with no costs as court received no help from the advocates.

**NYANZI YASIN  
JUDGE  
03/04/2013**

3/04/2013

Mr. Ondoma on brief for Akile Sunday.

Ondoma for respondent

Appellant absent

Respondent present.

Mr. Ondoma

The case is for judgment both ready to receive the judgment.

Nyanzi Yasin

03/04/2013