THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[CIVIL DIVISION]

CIVIL REVISION No. 0010 OF 2017

[Arising from the Chief Magistrate's Court of Mengo Civil Suit No. 3199 of 2010]

PASTOR ELIDAD MULIRA :::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

MUGISA JULIUS KAMULEGEYA :::::::::::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

RULING:

Pastor Elidad Mulira *(hereinafter referred to as the "Applicant")* brought this application against Mugisa Julius Kamulegeya *(hereinafter referred to as the "Respondent")* under the relevant cited provisions of the law, seeking orders of this court revising the ruling and decree of His Worship Mr. Charles Taska Kisaakye, Chief Magistrate of the Mengo Chief Magistrate's Court sitting at Mengo *(hereinafter referred to as the "trial court")* in Civil Suit No. 3199 of 2010. The Applicant prays the trial court's finding and orders that *Civil Suit No. 3199 of 2010: Pastor Elidad Mulira vs. Mugisha Julius Kamulegeya* is res judicata be revised and set aside; the execution

of the decree and orders arising therefrom be stayed, and/or set aside and costs of this application be provided for.

The grounds of the application are that by its ruling and orders in Civil Suit No. 3199 of 2010, the trial court exercised jurisdiction vested in it illegally and/or with material irregularity and/or injustice, when it concluded the entire suit by striking it out in an interlocutory application for amendment of pleadings. Further, that trial court exercised jurisdiction vested in it illegally and with material irregularity and/or injustice when it failed to accord the Applicant a fair hearing, since the amended plaint and the amended written statement of defence were not placed before the trial court for determination. The grounds are supported by an affidavit sworn by the applicant, which was opposed by the Respondent who also filed an affidavit in reply to that effect. The gist of the parties' respective depositions is in the summarized background below.

Background:

Sometime in 2004, the Respondent filed in the High Court, *HCCS No. 671 of 2004: Mugisa Julius Kamulegeya Ateenyi vs. Alikisanderena Robinah N.Z Kiwaala & Pastor Elidad Mulira* seeking for mesne profits, general damages for trespass to land and

inconveniences suffered, an eviction order, a permanent injunction and costs of the suit. The Applicant herein was the 2nd defendant in that suit. Subsequently, the parties entered into a consent judgment, and also orally agreed that the Respondent furnishes the Applicant with signed transfer and mutation forms and the mother title to enable the Respondent to effect the sub – division and process the certificate of title for his own plot of land. In the consent judgment, the parties agreed to an access road of 3 feet. However, according to the KCCA Regulations, this was too small for the purpose. The Applicant then approached the Respondent to sell him a 20 feet access road, but the Respondent refused to do so. The Respondent also refused to honor the oral undertaking to furnish the Applicant with the transfer and mutation forms for his plot of land. This prompted the Applicant to file *Civil Suit No. 3199 Of 2010: Pastor Elidad Mulira vs. Mugisa Julius Kamulegeya,* in the trial court seeking an order compelling the defendant to sign mutation and transfer forms in the plaintiff's favour and to provide the plaintiff with the original certificate of title to curve off his plot/portion, and an order for the defendant to give the plaintiff an

access road of 20 feet, and a permanent injunction against the defendant from blocking the plaintiff's access road.

Arising out of the suit in the trial court, the Applicant then filed an application seeking to amendment the plaint. The Respondent did not file a reply to the said application. Nevertheless, when the application for amendment came up for hearing, counsel for the Respondent appeared and raised a preliminary objection on a point of law to the effect that Civil Suit No. 3199 of 2010 was res judicata. The trial court found in favour of the Respondent. The Applicant being aggrieved by the orders of the trial court filed this application seeking for orders of revision.

The Applicant was represented by *M/s.Lukwago & Co. Advocates* while the Respondent was represented by *M/s. Madiinah & Co. Advocates*. Initially, the Respondent on 10th April 2018, filed two affidavits in reply both sworn by himself. One was filed through *M/s. Ngaruye Ruhindi, Spencer & Co. Advocates* and another through *M/s. Madiinah & Co. Advocates*. Though the former affidavit was also duly served onto the Applicant's counsel, it was subsequently withdrawn by the Respondent and hence ceased to be part of the record.

Counsel for the Applicant raised a complaint that they were never served with a Notice of Change of Instructions from *M/s. Madiinah & Co. Advocates*, but nevertheless proceeded to make submissions in the matter; to which counsel for the Respondent also made their submissions in reply. It is noted that *M/s. Ngaruye Ruhindi, Spencer & Co. Advocates* only represented the Respondent in the trial court and *M/s. Madiinah & Co. Advocates* in this court. It was thus not called for that the respondent files a Notice of Change of Advocates since the application for revision was an entirely new matter, in the High Court, with new instructions altogether to the new lawyers. Thus this court has considered the respective lawyers' submissions in arriving in this matter. The issues for determination are as follows;

1. ***Whether the trial court in ruling that the Applicant's suit be struck out with costs for being res judicata, acted illegally or with material irregularity or injustice.***
2. ***What remedies are available to the parties?***

Resolution of the issues:

Issue No.1: Whether the trial court in ruling that the Applicant's suit be struck out with costs for being res judicata, acted illegally or with material irregularity or injustice.

The High Court's power of revision is provided for under Section 83 of the Civil Procedure Act, Cap 71, which states as follows;

> ***"The High Court may call for the record of any case which has been determined under this Act by any magistrate's court, and if that court appears to have —***
>
> ***(a) exercised a jurisdiction not vested in it in law;***
>
> ***(b) failed to exercise a jurisdiction so vested; or***
>
> ***(c) acted in the exercise of its jurisdiction illegally or with material irregularity or injustice,***
>
> ***the High Court may revise the case and may make such order in it as it thinks fit…"***

Clearly, the applicability of the provisions is strictly in specific respect to the exercise of, or the wrongful exercise of and /or the failure to properly exercise the jurisdiction so vested, by a subordinate court. See: ***Tayebwa vs. Bangonzya & Anor [1992 –***

1993] HCB 143. It would thus appear that injustice or irregularity other than in the exercise of jurisdiction by a subordinate court must be remedied by an appeal rather than revision.

On the other hand, the doctrine of res judicata is enshrined under Section 7 of the Civil Procedure Act (supra) as follows;

> ***"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 has been heard and finally decided by that court."***

In ***Maria Kevina vs. Kyaterekera Growers Coop Society [1996] 1 KALR 160*** it was held that for the res judicata to apply to any case, the essential elements which must be fulfilled are that the matter in issue must be similar and must have been directly or substantially in issue in a previous suit; the parties must be the same or other parties, but claiming from the parties in the previous suit; the

courts in either case must be of competent jurisdiction; and the matters should have been heard on merits and finally determined by the previous competent court.

The rationale of the doctrine of res judicata is well stated in ***Ponsiyano Semakula vs. Sasane Magala & 2 Others (1979) HCB 90***, as follows;

> "***The doctrine is a fundamental doctrine to the effect that there must be an end to litigation. Accordingly every matter should be tried fairly once and having been so tried, all litigation about it should be concluded forever between the parties."***

As applicable to the instant application, it is shown on the record that when the application to amend the Applicant's plaint came up for hearing before the trial court, learned counsel for the Respondent raised a preliminary objection on a point of law premised on the doctrine of res judicata. Counsel for the Applicant herein faults the Respondent for having failed to file an affidavit in reply to the said application for amendment, and argues that the effect of the failure was that the Respondent did not contest the application, which

should have been allowed by the trial court. Further, that the objection based on res judicata was not true that all issues relating to the suit property were conclusively handled in High Court Civil Suit No. 671 of 2004 by a consent judgment that was recorded and executed between the parties. That the objection was only made purposely to mislead the trial court as it did. That the plaintiff's claim in HCCS No. 671 of 2004 was for mesne profits, general damages for trespass to land and inconveniences suffered, an eviction order and permanent injunction, and that the consent judgment reflects the terms as follows;

a) ***The 2nd Defendant (now applicant) shall pay to the Plaintiff (now Respondent) UGX.16,000,000/= in full and final settlement of the Plaintiff's land now occupied by the 2nd Defendant.***

b) ***.....The Plaintiff shall furnish a foot path equivalent to 3 feet.....***

That on the other hand, the Applicant's plaint in Civil Suit No. 3199 of 2010, which was on court file at the time the preliminary

objection of res judicata was raised, was for different claims of an order that the defendant signs mutation and transfer forms in the plaintiff's favour and to provide the plaintiff the original certificate of title to curve off his plot/portion, order that the defendant gives the plaintiff an access road of 20 feet and a permanent injunction against the defendant from blocking the plaintiff's access road. Counsel for the Applicant argues that these claims/cause of action in Civil Suit No. 3199 of 2010 are new issues that do not appear at all in the plaint for HCCS No. 671 of 2004 or even the consent that arose therefrom.

Counsel for the Applicant further submitted that the trial court's ruling and order of dismissing the Applicant's Civil Suit No. 3199 of 2010 on the ground of res judicata was based on speculative assumption. That the trial court did not address its mind to the plaints of both HCCS No. 671 of 2004 and Civil Suit No. 3199 of 2010, especially the plaint that was on the court record at the time of hearing the application for amendment. That it is not anywhere in the ruling of the trial court that it addressed its mind to both plaints and the consent judgment arising from in HCCS No. 671 of 2004;

thus came to a decision that occasioned a miscarriage of justice when the trial court dismissed the suit prematurely and thus causing an injustice to Applicant; for which he prays that this court finds that the trial court exercised its jurisdiction illegally and/or with material irregularity or injustice, and revises the ruling and orders therefrom and sets them aside as well as their execution.

In reply, counsel for the Respondent relied on paragraph 9 and10 of the Respondent's affidavit in reply and argued that the Applicant was attempting to revise, review/alter the consent judgment of HCCS No. 671 of 2004 to expand his access road under the guise that the Respondent had refused to hand over signed transfer and mutation forms. That this is untrue as the consent judgment does not in any way mention any signing of transfer and mutation forms. Further, relying on paragraphs 8, 9, 11, 12 and 13 of the Respondent's affidavit in reply, counsel argued that they show that the trial court rightly considered and decided that the matter is res judicata.

In determining the issue of res judicata, this court has carefully read the pleadings of the parties in the trial court in the Civil Suit No.

3199 of 2010, the ruling therefrom, the pleadings of the parties in the High Court in HCCS No. 671 of 2004 and the consent judgment arising therefrom. It is appreciated that the trial court rightly found the suit as being res judicata and it was thus not even necessary for the trial court to refer to the amended plaint that had been placed on the court record. The court record already showed that parties to Civil Suit No. 3199 of 2010 were the same parties to HCCS No. 671 of 2004. The subject matter of the litigation; i.e. Block 4 Plot 69 land at Namirembe Road was the same subject matter in both matters. The plaintiff in Civil Suit No. 3199 of 2010 had sought the same remedies in the terms which are the same as those in the consent judgment that was already executed and entered into by the parties in HCCS No. 671 of 2004.

That the matter is res judicata is also well be illustrated in the prayers which the Applicant sought in the plaint in Civil Suit No. 3199 of 2010. He sought for, inter alia, a declaration that he is the undisputed legal owner of all the land measuring 62 feet by 37 feet, part of Block 5 Plot 68 at Namirembe Road, the access road to the said land measuring 20 feet, and an order to compel the Respondent

to deliver the original title deed for Block 4 Plot 68 and signed mutation and transfer forms to enable him curve off his portion. These prayers are at the same time the very terms of consent which the parties executed and entered into in HCCS No. 671 of 2004, except that the agreed access was a footpath equivalent to 3 feet at the boundary, as opposed to the 20feet that was being claimed by the Applicant in Civil Suit No. 3199 of 2010. When these facts are viewed together against the operation of the doctrine of res judicata, it becomes quite evident that the Applicant in Civil Suit No. 3199 of 2010 was attempting to bring the same matters or alter the consent judgment of the HCCS No. 671 of 2004 simply in order to expand the width of his access road from the initially agreed 3 feet to 20 feet under the guise of the Respondent having refused to hand over to him signed transfer and mutation forms. This would be untenable because such a remedy could have easily been obtainable through execution of the consent judgment in HCCS No. 671 of 2004 and not filing another suit in the trial court. This is more so given that the Respondent, in the said consent judgment, agreed to sell to the Applicant the suit land at UGX.16, 000,000, which the Applicant paid and even had in his possession the acknowledgement of receipt.

It would follow, therefore, that even if the trial court had considered the proposed amendment, the suit would still be res judicata given that it involved same parties, the same subject matter and substantially the same prayers; unless of course the Applicant by his amendment sought to depart completely from his original cause of action, which would still be legally untenable. The trial thus court correctly applied the principles that underpin the doctrine of res judicata to the facts of the case and came to the right decision.

In their submissions, counsel for the Applicant suggest that the Respondent did not file an affidavit in reply to the application for amendment and that as such was presumed not to contest the application. This argument, however, lacks merit. There is no legal requirement for a Respondent in an application to file an affidavit in reply, where the Respondent intends to appear and argue the application only on points of law. Res judicata is one such point of law which, in my view, counsel for the Respondent upon appearing in the trial court correctly and properly raised.

In addition and most importantly, a preliminary objection on a point of law can be raised at any stage of proceedings, if it can dispose of

the suit. As the Court of Appeal guided in ***Maniraguha Gashumba vs. Sam Nkundire CACA No. 23 of 2005,*** an illegality once brought to the attention of court overrides all forms of pleadings including admissions thereon. Similarly, pleadings being res judicata is an illegality and no court ought to try the matter that fall within the ambit of res judicata. The trial court lacked the jurisdiction to entertain the Applicant's application for amendment of the plaint since the main suit from which the application arose was res judicata.

The Applicant's counsel also raised the issue in their submissions, that since the reliefs sought in HCCS No. 671 of 2004 and the terms of the consent judgment are different from those in Civil Suit No. 3199 of 2010, the suit is not res judicata. However, the reading of Section 7 of the Civil Procedure Act (supra) dispels that view as erroneous. Explanation 4 and 5 to the provisions above are clear that even if the reliefs sought or the ground of defence or attack is new or different, for as long as all the essential elements are present, the matter is res judicata. *Explanation 4* states as follows;

"Any matter which might and ought to have been made a ground of defence or attack in the former suit shall be deemed to have been a matter of directly and substantially in issue in that suit."

Explanation 5 states as follows;

"***Any relief claimed in a suit, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused."***

Based on the above explanations of the provisions of Section 7 (supra) the issue of signing the transfer and mutation forms for the Applicant and giving him an access road of 20 feet instead of the agree 3 feet footpath that is reflected in the consent judgment, are deemed to have been directly and substantially in issue in that suit and/ or to have been refused and which cannot be raised again in a fresh suit hence the suit is res judicata. In ***Semakula vs. Magala & Others [1979] HCB 90,*** citing the case of ***Kamunye vs. Pioneer Assurance Ltd [1971] EA 263,*** it was held that res judicata not only applies to points upon which the first court was actually required to adjudicate upon, but to every point which properly

belonged to the subject of the litigation and which the parties exercising reasonable diligence might have brought forward at the time. Any matter which might or ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. A party is bound to bring forward his/her whole case in respect of a matter being litigated, and cannot, after ignoring or abandoning part of his/her ground for a claim make fresh cause of action latter.

Upon signing the consent in HCCS No. 671 of 2004 and the Applicant fully paying the decretal amount, the Respondent signed mutation, transfer and consent forms, in favor of the Applicant. However, KCCA could not give a title as the plot and access were very small according to the KCCA policies and regulations. The Applicant then approached the Respondent to sell him a 20 feet access road, which the Respondent refused to do. That clearly shows the Applicant's open attempt to transfer the title with the only hindrance being the KCCA regulations. The Applicant thus ingeniously brought another suit to circumvent the terms of the consent judgment such that his land is increased from that defined

by the boundary wall to 62 feet by 37 feet, and his foot path transformed into an access road of 20 feet; all of which were grounds arising in the former suit and therefore nothing short of being res judicata.

It is on record that as at the time of the consent judgment, the Respondent had already obtained an approved building plan from KCCA and commenced on developing the same land. It is also noted that the 3 feet - footpath was agreed upon after the Applicant failed to raise money to compensate the Respondent for both the land and developments thereon, which was before giving the Respondent a 20 feet access road. This makes it even clearer that the matter was indeed res judicata.

The record of proceedings, especially the ruling of the trial court and the affidavit in support of the application, further show that before dismissing the suit as being res judicata, the trial court compared the pleadings in both suits and having before it the plaint in Civil Suit No. 3199 of 2010 and the written statement of defence on which was attached documents pertaining to the suit in HCCS No. 671 of 2004, that was sufficient material upon which the trial

court could conclude that the matter was res judicata. Even if the trial court had not addressed itself to both plaints in the two suits, it would still not change the fact that the matter was res judicata; and this court would not condone it either.

The net effect is that the trial court rightly dismissed the Applicant's suit and disregarded the proposed amendment. The Applicant has not advanced any sufficient ground to warrant the setting aside and revision of the orders and decree of the trial court. Accordingly, this application is dismissed with costs.

BASHAIJA K. ANDREW

JUDGE

10/01/2020