

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASAKA
CIVIL APPEALS NO. 54 OF 2019, 24 OF 2020 & 17 OF 2020
(ARISING FROM CIVIL SUITS NO. 57 OF 2018 AND 124 OF 2018 OF CHIEF
MAGISTRATES COURT

1. KIMBOWA NICHOLAS
2. NAKIRIJA ELIZABETH
3. TEDDY NABACHWA
4. JULIE NAJJEMBA
5. NAKIWALA HAWA
6. KABOGOZA MOSES
7. SSEMBATYA HENRY
8. JOSEPH LUTAAYA
9. KATO DEUS (Sons and Daughters of the deceased) :::::::::::::::::::: APPELLANT
VERSUS
1. NALUBOWA MARGRET
2. SEMBUSI CHARLES
3. PETER SSENKUNGU :::::::::::::::::::: RESPONDENTS

Before; Hon Lady Justice Victoria Nakintu Nkwanga Katamba

JUDGMENT

Background;

The 2nd Respondent, Sembusi Charles, instituted Civil Suit No. 57 of 2018 seeking recovery of land arising from the sale of land comprised in purported sale of a kibanja situate at Kijjabwemi Kimanya Kyabakuza Sub County in Masaka District measuring 112ft by 112ft by 80ft developed with 3 commercial houses and other business properties, from the 1st Respondent herein. The 1st Respondent did not file a defence and the suit proceeded exparte and was determined against her. The said exparte judgment was set aside in MA No. 74 of 2019 on the 20th day of November, 2019. The 2nd Respondent was ordered to file a defence and have the suit proceed interpartes and also to deposit Ugx. 25,000,000/= as security for costs.

The 2nd Respondent appealed against the order for security deposit in Civil Appeal No. 24 of 2020.

The 2nd Respondent appealed against the order setting aside the ex parte judgment in Civil Appeal No. 17 of 2020.

The Appellants herein filed Civil Suit No. 124 of 2018 against the Respondents herein seeking to challenge the sale between the 1st and 2nd Respondent herein over the same suit land comprised in purported sale of a kibanja situate at Kijjabwemi Kimanya Kyabakuza Sub County in Masaka District measuring 112ft by 112ft by 80ft developed with 3 houses, 3 commercial houses and other business properties. The trial Magistrate dismissed the suit for being res judicata basing on the ex parte judgment in Civil Suit No. 57 of 2018.

The Appellants brought this appeal to challenge the dismissal.

The 2nd Respondent brought Misc. Application No. 150 of 2020 against the 1st Respondent, 2nd Respondent and the Appellants herein seeking to have CA No. 24 of 2020, CA No. 17 of 2020 and CA No. 54 of 2019 consolidated and all other proceedings in CA No. 17 of 2020 and CA No. 24 of 2020 to be stayed until determination of CA No. 54 of 2019.

On the 15th day of March, 2021, this court made an order for consolidation of CA No. 24 of 2019 and CA No. 17 of 2020 both arising from CS No. 124 of 2018, and an order that CA No 54 of 2019.

I have appraised myself with the facts of the dispute between the Parties which arise from the same land, and seeks to enforce the sale of the suit land (by the 2nd Respondent against the 1st Respondent) and challenge the sale of the suit land (by the Appellants against the Respondents).

Determination by court;

Despite the order of this court delivered on the 15th day of March, 2021, I will consider the different appeals herein starting with CA No. 54 of 2019.

The Appellants/Plaintiffs instituted Civil Suit No. 124 of 2018 against the Respondents/Defendants jointly seeking a declaration that the purported sale of a kibanja

situate at Kijjabwemi Kimanya Kyabakuza Sub County in Masaka District measuring 112ft by 112ft by 80ft developed with 3 commercial houses and other business properties by the first Defendant to the Second Defendant was illegal void *ab initio*, an order for vacant possession of the Kibanja , a permanent injunction, general damages and costs of the suit.

The Plaintiff/Appellants' case is that they are beneficiaries of the estate of the late Paul Luyimbazi and the 1st Defendant is a widow and one of the administrators of the estate. The 1st and 3rd Respondent sold the suit land without the consent of the beneficiaries despite the suit land being reserved as family land in the inventory. The Plaintiffs averred that the sale was illegal and the 2nd Defendant/Respondent's possession amount to trespass.

In their joint Written Statement of Defence, the 1st and 3rd Defendants/Respondents denied the claim and contended that they never sold the kibanja but used it as security on the 30th day of September 2017 to borrow Ugx. 5,000,000/= from the to the 2nd Defendant/Respondent. The alleged copy of the sale agreement was only brought to their attention upon perusal of the pleadings.

In his Written Statement of Defence, the 2nd Defendant/Respondent denied the claim and stated that the 1st Defendant sold the suit land to him and the transaction was personal whereof there was no need for family consent. The 2nd Defendant further contended that he holds a bona fide right over the suit land and was introduced to the local authorities on the 28th February 2018 as the new occupant.

Counsel for the 2nd Defendant raised a preliminary point of law that the suit was res judicata in reference to Civil Suit No. 57 of 2018 between the 2nd Defendant and the 1st Defendant which was determined ex parte against the 1st Defendant. Counsel argued that the kibanja in dispute in Civil Suit No. 57 of 2018 is the same as the kibanja in Civil Suit No. 124 of 2018 and invited court to find that the ownership of the 2nd Defendant on the suit kibanja was already determined and Civil Suit No. 124 of 2018 should be dismissed.

Counsel for the Plaintiff argued that the Plaintiffs were not party to Civil Suit No. 57 of 2018 which proceeded ex parte and the Plaintiffs were not aware of it. Further, Counsel

submitted that the issues to be determined in both suits were different since Civil Suit No. 57 of 2018 was for vacant possession whereas Civil Suit 124 of 2018 sought to determine the true ownership of the suit land and also challenge the alleged sale between the 2nd Defendant and 1st Defendant. It is also Counsel's submission that the issue of sale and ownership of the suit land was never determined or addressed.

In his ruling, the trial Magistrate found that the question as to whether the 2nd Defendant legitimately bought the suit kibanja was resolved in Civil Suit No. 57 of 2018 and filing a suit over the same question offended Section 7 of the CPA. The trial Magistrate upheld the preliminary point of law and dismissed the suit with costs.

Being dissatisfied with the ruling of the trial Magistrate, the Appellants/Plaintiffs filed this appeal on the following grounds;

1. The Learned Trial Magistrate grossly erred in law and fact when he misdirected himself on the law relating to res judicata reaching an erroneous decision which occasioned a miscarriage of justice;
2. The learned Trial Magistrate grossly erred in law when he rejected to rely on the written submissions of the Appellant hence occasioning a miscarriage of justice;
3. The learned trial Magistrate grossly erred in law when he refused to give a fair hearing to the Appellants hence occasioning a miscarriage of justice;

The Appellants pray for the appeal to be allowed, the lower court's decision set aside, the matter retried on its merits and costs of the appeal and the lower court to be provided for.

Both Parties filed written submissions.

Counsel for the Appellants submitted that it was wrong for the trial Magistrate to hold that Civil Suit No. 124 of 2018 offended *Section 7 of the Civil Procedure Act* because the doctrine of res judicata does not apply to the instant case. Counsel cited Section 7 of the CPA and the case of James Katabazi & 21 others quoted in *Godfrey Magezi Vs National Medical Stores, CIPLA Quality Chemical Industries LTD, The AG Civil Suit No. 636 of*

2016 where court stated that for the doctrine to apply; the matter must be directly and substantially in issue in the two suits, the Parties must be the same of the same parties under whom any of the claims, litigating under the same title and the matter must have been finally decided in the previous suit. Counsel argued that the Appellants were not party to the initial suit and were not aware of it since it proceeded ex parte and further that the issue to be determined in the initial suit was vacant possession whereas the instant case seeks to determine ownership of the suit land.

It is also counsel's submission that the learned trial magistrate erred in law when he refused to give the Appellants/Plaintiffs a chance to be heard. Counsel prayed for the dismissal to be set aside and the suit be set down for hearing by the Chief Magistrate of Masaka.

Counsel for the 2nd Respondent cited Civil Suit No.636 of 2016 (supra) and submitted that the 1st Respondent, one of the administrators of the estate of the late Paul Luyimbazi sold the suit kibanja to the 2nd Respondent which she did on part of the beneficiaries and the Appellants are estopped by law from challenging the sale. Counsel argued that the Appellants cannot say that they were not party to Civil Suit No. 57 of 2018 yet their estate administrator was party to the suit. Further, that the issue of ownership was resolved and the trial court could not give vacant possession to a person who is not the rightful owner. Counsel submitted that the tenets of a suit being res judicata under Section 7 of the CPA were proved in the lower court.

Consideration of the appeal:

It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (*see Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000; [2004] KALR 236*). In a case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (*see Lovinsa Nankya v. Nsibambi [1980] HCB 81*).

I will resolve the grounds of appeal in the same order as they were argued by counsel for the Appellants.

Grounds 1 & 2;

Ground one; The Learned Trial Magistrate grossly erred in law and fact when he misdirected himself on the law relating to res judicata reaching an erroneous decision which occasioned a miscarriage of justice;

Ground two; The learned Trial Magistrate grossly erred in law when he rejected to rely on the written submissions of the Appellant hence occasioning a miscarriage of justice;

The main issue of contention is whether the trial Magistrate erred in holding that Civil Suit No. 124 of 2018 was res judicata in regards to the earlier suit Civil No. 57 of 2018.

The doctrine of res judicata as set out in ***Section 7 of the Civil Procedure Act*** ousts the jurisdiction of any court from trying a suit or issue that has already been adjudicated upon and finally determined by a court of competent jurisdiction. It provides 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. Six explanations are made under that section to clarify on matters that may be mistaken”.

From the foregoing, the doctrine of res judicata will be raised and upheld if it is proved that:

- i. The suit or issue raised was directly and substantially in issue in a former suit.
- ii. That the former suit was between the same party or parties under whom they or any of them claim.
- iii. That those parties were litigating under the same title.

- iv. That the issue in question was heard and finally determined in the former suit.
- v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit

According to *Black's Law Dictionary 7th Edition*, the term *res judicata* is a Latin word that refers to an issue that has been definitively settled by judicial decision.

The test for determining whether a suit is Res judicata a suit is res judicata was laid out in the case of *Kamunye and others vs. the Pioneer General Assurance Society Ltd (1971) EA 263 per Law, ag, V-P (as he then was) as follows;*

“The test Whether or not a suit is barred by Res-judicata seems to me to be, is the Plaintiff in the second suit trying to bring before court in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceeding and which has been adjudicated upon? If so, 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 properly belongs to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. The subject matter in the subsequent suit must be covered by the previous suit, for Res judicata to apply.” (emphasis mine.)

I have carefully considered both Parties submissions and the record of the lower court for both Civil Suit No.57 of 2018 and Civil Suit No. 124 of 2018.

Civil Suit No. 57 of 2018 indeed proceeded ex parte and the ex parte judgment of the court delivered on the 9.7.2018 against the Defendant/1st respondent herein was for vacant possession. The Plaintiff/2nd Respondent herein sought for an order of vacant possession in Civil Suit No. 57 of 2018 and the claim arose from a sale agreement between himself and the 1st Respondent herein for the suit kibanja.

The claim in Civil Suit No. 124 of 2018 sought to challenge the sale between the 1st Respondent and 2nd Respondent in relation to the suit kibanja and it was between the Appellants and Respondents herein.

Civil suit No. 124 of 2018 was dismissed on a preliminary point of law that it was res judicata and the trial Magistrate stated that the question as to whether the 2nd Respondent legitimately bought the suit kibanja was determined in Civil Suit No. 57 of 2018.

Taking into consideration the test to be applied for the doctrine of res judicata to apply as stated in *Kamunye & others (supra)* and the elements in *Section 7 of the Civil Procedure Act*, it is very apparent that the plaintiffs in Civil Suit No. 124 of 2018 are different from the Plaintiff in Civil Suit No. 57 of 2018.

In Civil Suit No.57 of 2018, the Plaintiff/2nd Respondent sought to enforce the sale agreement with which she claimed to have acquired ownership of the suit land, and obtain vacant possession of the same from the Defendant/1st Respondent herein.

The Plaintiffs in Civil Suit No. 124 of 2018 claiming as beneficiaries, sought to challenge the sale enforced in Civil Suit No. 57 of 2018.

The subject matter/suit kibanja is the same in both suits, however the Parties/Plaintiffs are different.

Civil Suit No. 57 of 2018 was heard and determined ex parte and the decision of the trial Magistrate was mainly hinged on the fact that the Plaintiff's evidence was uncontroverted. I note that at the time the ruling in Civil Suit No. 124 of 2018 was delivered dismissing the suit on the 30th day of August 2018, and when this appeal was filed on the 23rd day of September 2019 (as per the Memorandum of Appeal), the ex parte judgment was still in force but as of the 20th November, 2019, the ex parte judgment was set aside. This therefore means that the 1st Respondent can no longer rely on the order of the court in Civil Suit No. 57 of 2018 to assert his ownership of the suit land or that the sale was legitimized by the court.

This court also notes that the decision dismissing the suit for being res judicata was arrived at while the ex parte order was still in force.

Counsel for the 2nd Respondent argued that all the tenements of a suit being res judicata under Section 7 of the Civil Procedure Act were proved in the lower court and the trial Magistrate never erred as he properly evaluated the evidence on court record.

In his judgment, the trial Magistrate held that Civil Suit No. 57 of 2018 was adjudicated and concluded. As already noted, Civil Suit No. 57 of 2018 was determined ex parte and the Defendant therein/1st Respondent herein was never heard before the court.

For a matter to be res judicata, the matter directly and substantially in issue must have been heard and finally disposed of in the former suit (*see the case of Lt David Kabarebe v. Major Prossy Nalweyiso C.A Civil Appeal No.34 of 2003*). For the doctrine to apply there must have been a decision on the merits of the case. Therefore, where the decision was not made on the merits of the suit, the matter cannot be res judicata (*see Bukondo Yeremiya v. E. Rwananenyere [1978] HCB 96*).

Civil suit No. 57 was heard and determined ex parte and in his judgment, the trial Magistrate despite having not seen the original agreement for the sale of land, held that the evidence of the Plaintiff had been proved to the required standard. In Civil Suit No. 124 of 2018, the trial Magistrate stated that it does not matter that the earlier suit was heard ex parte.

I respectfully disagree with the learned trial Magistrate and state that the circumstances of this case call for the dispute to be heard and determined on its merits and considering that the parties/plaintiffs in Civil Suit No. 124 of 2018 were different from the parties in Civil Suit No. 57 of 2018 all claiming the suit land under different means, it was important that the case be heard on its merits.

In addition, I have observed that the substantial issue between the parties although arising from the same transaction was different. This is because the Plaintiff in Civil Suit No. 57 of

2018 sought to enforce the sale agreement and obtain an order for vacant possession which was simply granted without determining the legitimacy of the transaction on the merits of the case. The trial Magistrate even stated that he did not need to look at the original sale agreement since the Defendant had not challenged the suit.

It therefore goes to show that the dispute between the Parties herein is valid and their claim should be heard and determined by a competent court. The trial Magistrate was therefore at fault in holding that the matter was res judicata yet the Appellants in Civil Suit No. 124 of 2018 were not the Parties in Civil Suit No. 57 and neither was their claim which sought to challenge the transaction between the 1st and 2nd Respondents herein.

Consequently, I find that Civil Suit No. 124 of 2018 was not res judicata and the trial Magistrate erred in holding so.

The Appellants further claim that the learned trial Magistrate grossly erred in law when he refused to give a fair hearing to the Appellants hence occasioning a miscarriage of justice;

The right to a fair hearing is provided under the *Article 28 of the Constitution of the Republic of Uganda*. A miscarriage of justice occurs when it is reasonably probable that a result more favorable to the party appealing would have been reached in the absence of the error. (*see Olanya v Ociti & 3 Ors [2018] UGHCCD 52*). The Appellants were deprived of presenting the merits of their case when the trial Magistrate erred in holding that the suit was res judicata. This occasioned a miscarriage of justice.

In the result, I find that the Appellants have proved the merits of the appeal. Civil Suit No. 124 of 2019 will therefore be tried on its merits.

However, taking into consideration that Civil Suit No. 57 of 2019 seeks to enforce the same sale of land that is being challenged by the Appellants herein I find it prudent to stay Civil Suit No. 124 of 2019 pending the determination of Civil Suit No. 57 of 2019. An order for stay is hereby issued under *Order 11 1(b) of the Civil Procedure Rules* which allows this court on its own motion to stay proceedings until further orders.

Civil Appeal No. 24 of 2020;

Section 98 of the Civil Procedure Act gives this court power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. The 2nd Respondent brought Civil Appeal No. 24 of 2020 challenging the security for costs deposit of Ugx. 25,000,000/= as ordered by the trial Magistrate in MA No. 74 of 2019.

I have carefully considered the facts of the case in Civil Suit No. 57 of 2018 and I find that the justice of the case demands that the matter be determined on its merits. Having set aside the *ex parte* judgment, it was unnecessary for the trial Magistrate to attach such strict conditions and in particular such an amount for security for costs.

Order 26 Rule 1 of the CPR provides as follows:-

"The court may if it deems fit order a plaintiff in any suit to give security for the payment of all costs incurred by any defendant.."

The main purpose of a security for costs order, an interim remedy, is to alleviate that concern by requiring the claimant to pay money into court, or to provide some other form of security, as a precondition to being able to continue with the claim. (*Galukande v Kibirige & 2 Ors (Miscellaneous Application-2018/261) [2020] UGHCFD 8 (03 July 2020)*).

The dispute between the Parties had not been considered on its merits for the court to order security for costs to guarantee the Plaintiff/2nd Respondent`s costs incurred.

I therefore make an order setting aside the order for payment of Ugx. 25,000,000/= as security for costs deposit prior to filing her written statement of defence.

Civil Appeal No. 17 of 2020;

In CA No. 17 of 2020, the 2nd Respondent herein seeks to challenge the decision of the trial Magistrate setting aside the *ex parte* judgment. While resolving CA No. 54 above, I

resolved that Civil Suit No. 124 was not res judicata and also emphasized that Civil Suit No. 57 should have been determined on its merits. I have already confirmed the trial Magistrate`s decision allowing the 1st Respondent herein to file her written statement of defence. I therefore also confirm the trial magistrate`s decision setting aside the ex parte judgment.

In order to avoid multiplicity of proceedings, I find it prudent for the dispute between the Parties to be heard and determined on its merits. I therefore make my orders as follows;

1. Civil Appeal No. 54 of 2020 is hereby allowed;
2. Civil Suit No. 124 of 2018 is hereby stayed pending determination of Civil Suit No. 57 of 2018;
3. Civil Appeal No. 17 of 2020 is hereby dismissed;
4. Civil Appeal No. 24 of 2020 is hereby allowed and the amount for security for costs is hereby set aside;
5. Civil Suit No. 57 of 2018 shall proceed to be heard and determined on its merits;
6. No order is made as to costs.

I so order.

Dated at Masaka this 5th day of October, 2021.

Signed;



VICTORIA NAKINTU NKWANGA KATAMBA
JUDGE