

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
MISCELLANEOUS APPLICATION NO. 248 OF 2022

LILIAN NAMBASSA LYAGOBA
(Suing as Administrator of the estate of the late FRED
LYAGOBA).....APPLICANT
VERSUS

EQUITY BANK (U) LTD :::::::::::::::::::: RESPONDENT

BEFORE: HON. LADY JUSTICE FARIDAH SHAMILAH BUKIRWA
NTAMBI

RULING

Background

This is an Application for review and setting aside of the Dismissal order in Civil Suit No. 66 of 2020 made on the 13th day of December, 2022.

The grounds of the Application are that;

1. This Honourable Court made an order dismissing Civil Suit No. 66 of 2020.
2. The said dismissal order was premised on the fact that the Applicant had failed to prosecute the said case which was not true.
3. That the Applicant had been advised by her advocates that there was need to file an application to add M/s Lukum & Kasozi Associates as Defendants to the main suit which Application had been filed in time and fixed by the Court for hearing on the 20th of March, 2023 as Miscellaneous Application No. 266 of 2022.

When the matter came up for hearing, Counsel Obbo Francis Able appeared together with Counsel Odinga Ronald for the Applicant while Counsel Allan Ogoi appeared for the Respondent.

Counsel Allan Ogoi for the Respondent objected to the Application on grounds that it is res judicata because the issues to be adjudicated upon in the instant application are the same issues that Court had already determined on 13th December 2022. Both Counsel were allowed to make oral submissions which have been considered in this ruling.


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Submissions

Counsel for the Respondent submitted that res judicata is provided for under **Section 7 of the CPA** which prohibits the trying of the same matter that is in issue as it was in the former suit between the same parties and before the same Court. Counsel further submitted that the issue being tried again is the discretion of this Court to dismiss the main suit (Civil Suit No. 66 of 2020) under O. 17 r. 4 of the Civil Procedure Rules for failure by the Plaintiff to prosecute the matter and yet there was also a pending application filed by the Plaintiff to add a party under Miscellaneous Application No. 266 of 2022. That the issues being raised by the Applicant in the instant application had already been conclusively determined by Court on 13th December, 2022.

To support his submissions, Counsel Allan relied on the case of **Sam Akankwasa Vs URA Misc. Application No. 40 of 2019** in which it was held that for a matter to be res judicata, the Court ought to examine the record for the previous decision to determine whether it is the same matter before it. Counsel implored Court to look at both Counsel's submissions on 13/12/2022 and the decision of Court. He prayed that the Application be dismissed with costs as the same is res judicata.

In reply, Counsel for the Applicant submitted that the doctrine of res judicata bars a party from filing a fresh suit where issues in a former suit were substantially determined by Court. That the instant application is not a fresh suit. It arises out of Civil Suit No. 66 of 2020 which was dismissed. Counsel argued that Court was under the mistaken belief that M.A. No. 266 of 2022 that had been fixed for 23rd March, 2023 had no bearing on Civil Suit No. 66 of 2020. That the Court should have determined Misc. Appln. No. 266 of 2022 before making a decision to dismiss Civil Suit No. 66 of 2020. Dismissing the main suit without hearing the Misc. Appln amounted to an error on the face of record. Counsel relied on the case of **Farm Inputs Care Centre Ltd Vs Klein Karoo Seeds Marketing (PTY)Ltd Misc. Appln No. 0861 of 2021**. He further submitted that Court dismissed Civil Suit No. 66 of 2020 without hearing Misc. Appln. No. 266 of 2022 therefore violating the Applicant's right to be heard.

Counsel referred to **Section 82 of the CPA** for the principle that a person aggrieved by a decree or order from which an appeal is allowed may apply to Court to review the decree or order. Counsel prayed that Court appreciates the pleadings in the application and reviews its dismissal order to accord Miscellaneous Application No. 266 of 2022 an opportunity to be heard.

In his submissions in rejoinder, Counsel for the Respondent submitted that the Applicant did not demonstrate how different the issues raised in the proceedings of 13th December, 2022 are different from the instant Application. Counsel


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retaliated his earlier submission that substantially, the arguments in the instant application rotate around the same issues argued in Court by the parties on 13th December, 2022.

Regarding the Applicant's submission that res judicata bars a party from filing a fresh suit and that this is not a fresh suit, Counsel for the Respondent referred to the definition of a suit under Sect. 2 (X) of the CPA as all civil proceedings commenced in any manner prescribed. He submitted that the instant application is a suit which is res judicata.

Counsel for the Applicant clearly stated that he sought to review an error on the face of record which he stated to be failure of being given an opportunity to be heard by Court on 13/12/2022 to hear Miscellaneous Application No. 266 of 2023.

Counsel for the Respondent contended that the Applicant's argument is misguided as the issue at hand is for Court to determine whether this instant application seeks to re adjudicate the same issues that were put before court on 13/12/2022. He referred to the case of **Balaba Robinah Vs Hussein Mohammed Civil Suit No. 109 of 2017** where Court dismissed a suit where the Plaintiff had a pending Application to add parties reason being that the Plaintiff had disobeyed the Court's orders for the filing of witness statements.

The Respondent's Counsel further submitted that the instant application does not seek to correct an error on the face of record but is rather a matter of res judicata.

On the invocation of **Sect. 82 of the CPA**, the Respondent's Counsel submitted that for an application for review, there must be an error apparent on the face of the record and any error which has to be established by a long process of reasoning with two or more opinions cannot constitute an error on the face of record. Counsel relied on the case of **Kotokyo Wilber William Vs John K. Kaggwa & Anor Misc. Appln. No. 278 of 2019**.

Counsel concluded that it is very clear that the test as to whether a suit is res judicata is whether the Plaintiff wants to bring before the Court in another way or form a new action which action/transaction was already put before the Court earlier proceedings and was adjudicated upon. (**Kamunye & Ors Vs The Pioneer General Assurance Society Limited [1971]1 EA 263 (CAK)**). Counsel retaliated his earlier prayer that the suit be dismissed with costs for being res judicata.


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Analysis

Issues.

1. Whether Miscellaneous Application No. 248 is a suit and if so, whether it is res judicata.

Counsel for the Applicant contended that this Application is not a suit. **Sect 2 (x) of the CPA** defines a suit to mean all Civil Proceedings commenced in any manner prescribed.

In **The Registered Trustees of Madi West Nile Diocese Vs Lucia Eyotaru & 7 Ors M.A No. 0043 of 2019**, where an issue arose as to the applicability of Order 5 Rule 1 (2) of the CPR, the learned justice noted that, “.... the rule speaks in terms of “suit” and section 2 (x) of the CPA defines a ‘suit’ to mean all civil proceedings in any manner prescribed. The manner of commencement of the present suit is prescribed under Order 9 rule 12 and order 52 rules 1 & 3 of the Civil Procedure Rules. This therefore qualifies the instant application as a suit in the meaning of Section 2 (x) of the Civil Procedure Act.

I have no reason to depart from the foregoing since this suit was commenced in a manner prescribed under O. 52 rules 1,2 & 3 of the CPR by way of Notice of Motion. I thus find this matter to be a suit under the meaning of Section 2(x) of the Civil Procedure Rules.

Having found that this is a suit, I now turn to the issue as to whether it is res judicata.

Res judicata is provided for under Section 7 of the CPA where in it is stated that; “No Court shall try any suit 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 are 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 determining whether a suit is res judicata, the Court before which the issue of res judicata is raised must peruse the judgement of the Court in the first suit and ascertain that the judgement exhaustively dealt with the issues raised in that case and if possible, the Court should peruse the whole Court record so that it gets the opportunity to appraise itself of all matters raised in the earlier suit in order to decide whether the plea of res judicata succeeds or not. **(See Maniraguha Vs Nkundiye CACA No. 23 of 2005, Ponsiano Semakula Vs Sasare Magala &**



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Others, 1993, KALR 213, Sam Akankwasa Vs United Bank of Africa (U) Ltd Misc. Application No. 40 of 2019.)

I have exhaustively perused the Application and the record of proceedings in Civil Suit No. 66 of 2020 from which I have discerned that Civil Suit No. 66 of 2020 was filed on 18/11/2020, on 21/9/2022 when the matter came up for hearing, Counsel for the Plaintiff/Applicant prayed for directions to file trial documents and a date for hearing. Directions were given as follows; The Joint Scheduling Memorandum was to be filed by 5/10/2022, Plaintiff's trial documents by 19/11/2022, Defendant's trial documents by 2/11/2022 and the matter was adjourned to 13/12/2022.

On 13/12/2022, no trial document had been filed. Counsel for the Respondent submitted that the first time Court gave orders was on 25/5/2021 and since 2021, no action had been taken. Counsel prayed for the matter to be dismissed under Order 17 r 4 of the CPR. On the same day, Counsel for the Applicant submitted that he intended to amend his pleadings and as such did not file the Plaintiff's trial documents since the amendment of the pleadings would impact on the content of the trial documents. Counsel prayed for new directions to file the trial documents. He also raised the issue of Miscellaneous Application No. 266 of 2022 which had been given a date of 20/3/2023 and prayed to Court for leave to grant the application.

In dismissing the Civil Suit No. 66 of 2020, Court observed that the Plaintiff/Applicant had failed to comply with Court's directives on two occasions specifically on 25th May 2021 and on 21st September, 2022. The Plaintiff had failed to give any reasonable explanation for the noncompliance and Court was not convinced that Misc. Application No. 266 was filed to progress the case in any way. In any case, the issue of adding a Defendant never arose on 25th May, 2021 or on 21st September, 2022. Court found that the delay on the part of the Plaintiff was clear and the Plaintiff was using Miscellaneous Application No. 266 to abuse Court process.

In the affidavit in support of this Application sworn by the Applicant herself, she alludes to Court having not heard Miscellaneous Application No. 266 before dismissing Civil Suit No. 66 of 2020 which amounted to an error on the face of the record.

Counsel for the Applicant cited the case of **Farm Inputs Care Centre Limited (Supra)** to define what amounts to a mistake or error apparent on the face of record where in it was stated to constitute a situation where the Applicant was not served with a hearing notice or where the Court has not considered the amended pleadings filed or attachments filed along with the pleadings or where

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the Court has based its decision on a ground without giving the Applicant an opportunity to address the same and violation of the principles of natural justice.

From the record of proceedings of 13/12/2022, I have discerned that the issue of not hearing Misc. Application No. 266 was raised by Counsel for the Plaintiff/Applicant. Both Counsel submitted on it and Court found that the Applicant was using the said Application to abuse Court process. Following the definition of mistake or error apparent on the face of record given by Counsel for the Applicant, there is no mistake or error on the record. In arriving at its decision, the Court considered the existence of Miscellaneous Application No. 266 of 2022 as was raised by Counsel for the Applicant and ruled on it basing on the submissions of both parties.

Upon the dismissal of Civil Suit No. 66 of 2020, the Applicant's remedy was to appeal since the entire suit was resolved and the Miscellaneous Application No. 266 of 2022 was elaborately considered before the Court came made its decision.

It is my considered opinion, therefore, that Misc. Application No. 248 of 2022 is res judicata since it is based on the grounds that were determined in the dismissal of Civil Suit No. 66 of 2020. This Application is thus dismissed with costs.

I so order.

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JUSTICE FARIDAH SHAMILAH BUKIRWANTAMBI
Ruling delivered in Court on 14th June, 2022.