

THE REPUBLIC OF UGANDA
IN HIGH COURT OF UGANDA HOLDEN AT MASINDI
CIVIL SUIT NO. LD 0020 OF 2015

1. BURYAHIKA STEPHEN
2. MUHEREZA ASABA
3. MUHEREZA MUGISHA ::: PLAINTIFFS

VERSUS

1. HOIMA SUGAR LTD
2. RAJA
3. VENKAT RETHINASAMY
4. ATTORNEY GENERAL
5. KINYARA SUGAR WORKS LTD
6. AMORE INVESTMENTS LTD
7. NILE PLYWOODS (U) LTD
8. CPCS UGANDA LTD

} :: DEFENDANTS

Before: Hon. Justice Byaruhanga Jesse Rugyema

JUDGMENT

- [1] In the amended plaint, the 3 plaintiffs on their own behalf and on behalf of **120 Others** in their representative capacity, sued the 8 defendants jointly and/or severally for inter alia, illegally evicting the plaintiffs from their homesteads and crops, gardens and violation of their constitutional rights, compensation for the destruction of their properties, general and exemplary damages and costs of the suit.
- [2] However, during the course of the proceedings of this suit, the plaintiffs obtained a further representative order to bring this suit on their behalf and on behalf of **391 other** plaintiffs.
- [3] While the matter was proceeding under mediation, the **2nd, 3rd, 4th, 5th, 6th, 7th and 8th defendants** were by efforts of mediation dropped and or withdrawn from the suit leaving the 1st defendant as the only surviving defendant in the suit.
- [4] It was the plaintiffs' respective cases that they have been customary tenure holders on various pieces of land situated in the villages of

Muziranduru, Kijayo and Kyendagano all in **Munteme parish, Kiziranfumbi sub county, Buhaguzi County, Hoima district** which they claimed to had used uninterrupted for several years. They contended that in 2012, the plaintiffs and many others were attacked in their homesteads and their gardens were destroyed by a one **Herbert Rwakiswaza Kimera** (deceased) under circumstances of trespass which compelled the plaintiffs together with others to file **C.S No. 038/2012**. That in the course of this suit, the court granted an order of interim injunction restraining among others both parties, their agents, donees, representatives workers/servants and anybody claiming under them from interfering with the other's occupation, utilization or cultivation of the suit land.

- [5] It is further the plaintiffs' case therefore, that the suit against the 1st defendant stems from a violation of the said injunction order in **Misc. Application No.109/13** (arising from C.S No.38/12).
- [6] It is the 1st defendant's case as survivor defendant that it has no knowledge of the plaintiffs. That it is the registered proprietor of land comprised in **LRV 4394 Folio 25 plot No.40 Bugahya Block 6** (later corrected as **Block 12**) as a transferee for value from the previous owner **Herbert Rwakiswaza Kimera** (deceased). That on acquisition of the land, the 1st defendant took possession and embarked on developing it with sugar cane plantation and in addition thereto, established on the said land a sugar manufacturing plant. It denied ever evicting any person from any land lawfully held by such person.
- [7] Lastly, that any person who was a licensee on the said land were duly compensated by the 1st defendant's predecessor in title, **Herbert Rwakiswaze Kimera** and therefore, the 1st defendant has no knowledge of occupation of any part of the plaintiffs or any person that the plaintiffs are representing.

Counsel legal representation

- [8] The plaintiffs are represented by **Counsel Monobe Joseph** as lead Counsel together with **Ms. Joan Banana** while the 1st defendant as the surviving defendant is represented by **Counsel James Nangwala** as lead counsel, together with Counsel **Kenneth Sebabi**. Both counsel filed their respective final submissions on the suit as permitted by court.

Issues for determination

- [9] During the Joint Scheduling Conference, seven issues were agreed upon by the parties for determination but following the dropping off of the **2nd - 5th defendants**, the issues have to be modified so as to suit only the plaintiffs and the 1st defendant as the surviving defendant in the suit. This is also so, in view of the final determination of **C.S No. 38/2012** that formed the 1st issue in this case.
- [10] The issues for determination are in the circumstances modified as follows;
1. Whether the plaintiffs can sustain this suit on the same piece of land in light of the existing decided **Civil Suit No.038 of 2012** in the same court.
 2. Whether the plaintiffs and 391 others have been customary tenure holders and occupants of the various pieces of land situated in the villages of **Muzirenduru Kijayo** and **Kyendagano** all in **Munteme parish, Kiziranfumbi Sub County, Buhaguzi County in Hoima District**.
 3. Whether land registered as **LRV 4394, Folio 25, plot No.40 Bugahya Block 6 (later corrected as Block 12)** is one and the same with land comprised in and located at **Muziranduru, Kijayo, Kyendagano-Munteme parish, Kiziranfumbi sub county, Buhanguzi county, Hoima District** claimed by the plaintiffs.
 4. Whether the plaintiffs have any interest in the 1st defendant's registered land.
 5. Whether the plaintiffs and 391 others have suffered loss of house hold properties, damage and destruction to their homesteads, gardens occasioned by the 1st defendant (surviving defendant), its servants or agents in the course of their employment accruing from violation of the court order in **H.C.C.S No.038 of 2012**.
 6. Whether the 1st defendant's (surviving defendant) its servants or agents, motor vehicles were present and participated in the various processes leading to eviction of the plaintiffs.
 7. What remedies are available to the parties.

Determination of the issues

[11] Burden and standard of proof

“101. Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.*
- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

102. On whom burden of proof lies

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

103. Burden of proof as to particular fact

The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The above provisions of the law clearly shows that the burden of proof in this case lies on the plaintiffs to prove their case. It is trite law that the standard of proof in a civil case is on a balance of probabilities; **Nsubuga Vs Kavuma [1978] HCB 307**. The burden of proof in this case therefore, lies on the plaintiffs to prove their case on the balance of probabilities.

Issue No.1: Whether the plaintiffs can sustain this suit on the same piece of land in light of the existing decided Civil Suit No.038 of 2012 in the same court.

[12] This suit was instituted in court in 2015. The joint scheduling memorandum wherein the issue for determination of the suit was framed was filed on 17/2/2016. By then, **Civil Suit No.038/2012** was still pending in this court. However, **Civil Sit No.38/12** was heard and determined on 4/10/2021 before the conclusion of the present suit.

[13] In **Civil Suit No.038 of 2012**, the plaintiffs in the present head suit sued the legal representatives of the late **Herbert Rwakiswaza Kimera** (whom the 1st defendant/surviving defendant in the present suit derived his interest in the suit land) as the defendant for trespass on

suit property located in **Kiziranfumbi and Kabwoya sub counties, Hoima District**. They claimed that the defendant, their agents or servants' acts of evicting the plaintiffs from their plot of land, destroying their properties and fencing off their plots of land were illegal, unlawful and contravened the law.

- [14] In his submissions, counsel for the plaintiffs referred this court to the record of proceedings in **Civil Suit No. 38 of 2012** while arguing that the plaintiffs' suit against the 1st defendant/surviving defendant stems from the violation and abuse of injunction order that was issued in **Civil Suit No.38 of 2012**.
- [15] Counsel for the defendant on the other hand submitted that **Civil Suit No.38 of 2012** was determined in favour of the defendant, **Herbert Kimera Rwakiswaza**, the predecessor in title of the 1st defendant/surviving defendant's title. That **Buryahika Stephen Kamugisha** who was PW1 in both the present suit and **Civil Suit No.38/2012** in his testimony in both suits raised the same allegations of destruction of property on the same subject matter, the suit land and therefore, that the issues in this suit were the issues substantially in issue in **Civil Suit No.38/12** brought against **Herbert Kimera Rwakiswaza**. He argued that the present defendant has been claiming under the title of **Herbert Kimera Rwakiswaza**. That the plaintiffs' claim is based on ownership of land now known as **Block 12, plot No.39 and 40** which was previously owned by **Herbert Kimera Rwakiswaza** and has been transferred to the defendant in the present suit.
- [16] Counsel for the defendant argued further that instead of the plaintiffs filing a fresh (present) suit against the 1st defendant/surviving defendant as a transferee of the portion of land of **Herbert Kimera Rwakiswaza**, the defendant in **Civil Suit No.38/12**, they ought to have exploited the provisions of **O.24 r.9 CPR** and apply for amendment of the plaint in **C.S No.38/12** to add the present defendant since a portion of **Herbert Kimera Rwakiswaza's** land had devolved or come to the present defendant.
- [17] Counsel for the defendant concluded that in the premises, the present suit is **res judicata** under the provisions of **Section 7 Civil Procedure Act**. That the Section prohibits a trial of a suit in which the matter in issue has been substantially in issue in a former suit between the same parties or parties under whom they are litigating and a judgment of

court of competent jurisdiction has made a pronouncement over the same. That therefore the judgment in the present **C.S No.38/2012** is a judgment in rem which binds all the parties including the present surviving defendant.

- [18] On the other hand, counsel for the plaintiffs submitted that the plaintiffs suit against the 1st defendant, the surviving defendant after the rest were by efforts of mediation withdrawn, stemmed from a violation and abuse of the Order of injunction issued in **Civil Suit No. 38 of 2012** wherein the defendant and all those that were deriving from him in the said suit were ordered to maintain the status quo on the entire suit land. That the 1st defendant in the present suit, in breach of the order assembled Bull Dozers, razed down houses and destroyed gardens and other developments belonging to the plaintiffs for which the surviving defendant is liable.

Judicial Notice of Court records

- [19] Counsel for the plaintiffs in his submissions urged and invited this court to take judicial notice of the proceedings and pleadings in **C.S No.38 of 2012** as a record of the court that does not need to be proved further in these proceedings. He relied on the authorities of **Arim Felix Clive Vs Stanbic Bank (U) Ltd S.C.CA No.3 of 2015** and the Nigerian Supreme court case of **Gbaniyi Osafire & Anor Vs Paul Odi & Anor 149/1987**.
- [20] Counsel for the defendant in opposition, submitted and argued that the facts which court is supposed to take judicial notice of are outlined in **Section 58 of the Evidence Act**, sic (ought to be **S.56 of the Evidence Act**). That court proceedings are not part of such facts. That court is only entitled to look at a judgment of court of record by the doctrine of precedent.
- [21] It is trite that Judicial notice is the process by which courts take cognizance or notice of matters which are notorious or clearly established that formal evidence of their existence is not necessary, as well as matters of common knowledge and everyday life. In **Arim Felix Clive Vs Stanbic Bank (U) Ltd (supra)** Justice Tibatemwa-Ekirikubinza, JSC defined Judicial Notice as;

“a doctrine and/or the process by which courts take cognizance

of a matter which is notorious or clearly established that there is no need for a party seeking for its recognition by court, to adduce formal evidence for its proof.”

Judicial Notice therefore means the acceptance by a tribunal of the truth of a fact without proof on the grounds that it is in the tribunal’s own knowledge. It is an exception to the rule that all facts in issue or relevant facts must be proved by evidence. As observed by Kavuma JA in **Mifumi (U) Ltd & 12 Ors Vs A.G** and Kenneth Kakuru J.A in **Constitutional Petition No. 12/2007** (as they were by then), the list prescribed by **S.56 of the Evidence Act** is not exhaustive.

[22] The California Supreme Court in **Floros Vs Arroy (1961) 56 Cal.2 d 492, 496** observed thus:

“It is well established that courts may take judicial notice of the records of a court, including prior judgments of a court.”

The general rule is therefore, that the contents of court records are subject to judicial notice save for the truth of any facts contained therein. In effect, under this rule, a court may take judicial notice that certain documents were filed during and prior litigation, or that certain factual findings were made, but generally may not take judicial notice of the contents of the factual findings themselves.

[23] In this aspect, this court is entitled in this case to and it does, take judicial notice of the proceedings and judgment of **Civil Suit No. 38/12**.

[24] In this case, it is the case for the plaintiffs as submitted by their counsel that the plaintiffs’ suit against the 1st defendant/surviving defendant stem from a violation and abuse of the order of an injunction issued by the Hon. Justice Simon Byabakama in **C.S No.38 of 2012** wherein the defendant and all those deriving from him in the said suit were ordered to maintain the status quo on the entire suit land but that the 1st defendant in the present suit in breach of the order, assembled graders, Bull dozers and razed houses, destroyed gardens and other developments belonging to the plaintiffs.

[25] The said Order read as follows;

“THE REPUBLIC OF UGANDA
IN THE COURT OF UGANDA HOLDEN AT MASINDI
HIGH COURT MISCELLANEOUS APPLICATION NO.0109 OF 2012
(ARISING OUT OF CIVIL SUIT NO.0038 OF 2012)

KANKILI SULAIMAN & 389 OTHERS ::::::::::::::::::::::::::::::::::: APPLICANTS

VERSUS

HERBERT RWAKISWAZA KIMERA ::::::::::::::::::::::::::::::::::: RESPONDENT

ORDER

This application coming up this 4th day July 2014 before His Lordship Justice Simon Byabakama Mugenyi; ... in the presence of both parties, it is hereby ordered as follows:-

- 1. An interim order is issued restraining both parties, their agents, donees, representatives, workers/servants and anybody claiming under them from interfering with the other's occupation, utilization or cultivation of the portion of the suit land they presently occupy.*
- 2. The respondent is restrained from erasing, demolishing or destroying the existing gardens and structures of the applicants but is at liberty to carry out his activities on the undeveloped parts of the suit land.*
- 3. The Applicants are restrained from erecting or putting up new structures or opening new gardens on the undeveloped parts of the suit land.*
- 4. Costs to be in the cause.*

Given under my hand and seal of the court this 7th day of July, 2014.

Sign

.....

RESIDENT JUDGE”

- [26] The present suit was filed on **7/5/2015**. The 1st defendant was neither a party to **C.S No.38/12** nor in the above injunction order arising from it. The present 1st defendant in the instant suit is therefore sued for breaching the injunction order claiming under the estate of the late **Herbert Kimera Rwakiswaza**, the Respondent in the injunction order.
- [27] In its defence in the present suit, the 1st defendant as survivor averred and contended that it is the registered proprietor of the land comprised in **LRV 4394, Folio 25, plot 40 Bugahya Block 6** (later corrected as **Block 12**) as a transferee for value from the previous owner **Herbert Kimera Rwakiswaza** (deceased). It is in possession and embarked on developing the land with sugar cane plantation and a sugar manufacturing plant.
- [28] It is not in dispute that the former **Suit No.38/12** brought against **Herbert Kimera Rwakiswaza** was founded on the plaintiffs' claim that they are customary tenants and/or bibanja holders on land formerly comprised in **plot 6 Bugahya Block 6** (which was later corrected as **Block 12**) and was mutated to **plot 39 and 40** then belonging to **Herbert Rwakiswaza Kimera** land. The 1st defendant acquired a portion of **Herbert Rwakiswaza's** land by assignment and transfer for value out of the said Block. The plaintiffs in the former **C.S No.38/12** are the same plaintiffs in the present suit as clarified by **PW1** in his testimony in the present suit.
- [29] The evidence adduced by **Buryahika Stephen**, PW1, who as a representative of the plaintiffs in both the present suit and **C.S No.38/12** as per the proceedings in **C.S No.38/12** is as follows;
- "page5: I & 397 plaintiffs sued him (Herbert Rwakiswaza Kimera) for trespassing on our land. The suit land is located in eleven villages ie, Muziranduru, Kijayo, Kyabataka, Kyakasoro, Ikoba 1, Nyawante, Buhumuliro, Kadiko, Kyakasoro II, Kabango and Kyendagaano. I myself I am in Kijayo L.C1. I bought the land from Muhereza Mugisa. We did not measure it but it is about 150 acres...*
- Page 6: After buying the land I started grazing animals on the land, planted bananas, coffee, maize, beans and sweet potatoes. I constructed an iron roofed house of 25 iron sheets and three mud and wattle houses of workers...In 2002, one of my workers called Baguma found me in Kampala and informed*

me my houses were burnt...I went to the suit land and found my 3 grass thatched houses were burnt. The iron roofed house was damaged by removing the windows, doors and piercing the iron sheets. The destruction took place in many other peoples' houses, these are my fellow plaintiffs. Their houses were also burnt and their cattle, goats, pigs and chicken were taken. They were also assaulted. The banana plantations were cut and the harvested rice that was in peoples' houses was taken as well. Maize and rice gardens were also destroyed.

Page 8: *In May 2013, we saw graders clearing land in Kyendagano village, continued to Kyabikuti village, Muziranduru and Kijayo villages. The suit was already in court. They destroyed houses, bananas, coffee trees and other crops...The Indian is the one who brought the graders. He planted sugar canes in the area we were forcefully evicted from. The manager of that company is known as Raja. The Vehicles were seen in the area have the inscription of Kinyara sugar works.*

Page 9: *...the harassment intensified and we sought a temporary injunction from the court. An interim order was issued but it was not respected. They went ahead destroying our crops and planting their sugar canes. They were burning and demolishing our houses... **The eleven villages were in two sub counties of Kiziranfumbi and Kabwoya.***"

[30] The evidence adduced by **Omuhereza Asaba** (PW4) in **C.S No. 38/12** is also as follows;

Page 31: *"I and others brought him (Herbert Rwakiswaza Kimera) to court for destroying our crops and burning our houses. He has now sold the land to Indians who have planted sugar canes.*

Page 58: *The defendant's father (Herbert Rwakiswaza Kimera) destroyed many of my properties including houses, crops, Household items were also destroyed and now they have planted sugar canes on the land. We have photographs of the graders which destroyed our properties."*

Reexamination at pages 60 and 61

Page 60: "It affected even the people I am representing and they are crying. I have photos to show what happened..."

Page 60: I am challenging the titles in the names of Herbert Kimera Rwakiswaza...Block 6 plot 6 was processed far back in 1975 and it was called Hoima District which was not in existence by then..."

- [31] In summary, in **C.S No.38/12**, the plaintiffs sued the estate of the late **Herbert Rwakiswaza Kimera** for trespass to land located in eleven villages of **Muziranduru, Kijayo, Kyabataka, Kyakasoro, Ikoba 1, Nyawante, Buhumuliro, Kyakasoro II, Kadiko, Kabango and Kyendagano** and then, destruction of their crops, animals and houses and they were eventually evicted. The alleged trespass and destruction took place around 2002 and 2013. Then lastly, the plaintiffs claim to be challenging the titles of the suit land which were in the names of **Herbert Rwakiswaza Kimera**. They conclude that the late **Herbert Rwakiswaza Kimera** sold the land to Indians who have planted sugar canes thereon. Among the actors sighted in the claimed trespass and destruction of properties was an Indian identified as Raja (who happen to be **DW1**, in the defendant's proceedings in the present suit). It is therefore apparent that the Indian referred to by the plaintiffs are the present 1st defendant/surviving defendant representatives.
- [32] It is the plaintiffs' contention that as a result, of the above on going destruction of property, the plaintiffs secured an injunction against the defendant, **Herbert Rwakiswaza Kimera** Vide **M.A No. 109 of 2013** arising out of the **C.S No. 38/12** restraining both parties, their agents, donees, representatives, workers/servants and anybody claiming under them from interfering with the other's occupation, utilization and cultivation of the portion of the suit land they occupied.
- [33] It is the plaintiffs' further contention that upon disobedience and breach of the said injunction Order, they filed the present suit against the defendant.
- [34] In the present suit, the plaintiffs who admittedly are the same plaintiffs in **C.S No. 38/12** pleaded destruction of crop gardens, homesteads, harassment and assault on their various pieces of land situated in the villages of Muziranduru, Kijayo and Kyendagano in Kiziranfumbi sub

county, Hoima District against the surviving defendant as a party claiming under the late **Herbert Rwakiswaza Kimera**.

[35] As can clearly be seen from the foregoing, instead of the plaintiffs preferring a contempt of court case against the estate of the late **Herbert Rwakiswaza Kimera** and those claiming under the estate for disobedience and breach of the court injunction order, the plaintiffs opted to file the present suit against the surviving defendant as a party that was claiming under the estate of the late **Herbert Rwakiswaza Kimera**. The issues in the present suit are substantially the same and were in issue in **C.S No.38 of 2012** that was determined in favour of the estate of **Herbert Rwakiswaza Kimera**. Before the present suit was concluded and determined, **C.S No. 38 of 2012** was determined in favour of the estate of **Herbert Rwakiswaza Kimera**.

Doctrine of Res judicata and Res subjudice

[36] **Section 7 of the Civil Procedure Act provides** as follows;

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

The section prohibits a trial of a suit in which the matter in issue has been substantially in issue in a former suit between the same parties or parties under whom they are litigating and a judgment of a court of competent jurisdiction has made a pronouncement over the same.

[37] In **Mansuklal Ranji Karia & Anor Vs A.G & 2 Ors [2005] 1 ULSR 157**, Justice Tsekooko, JSC set down 3 conditions which must exist before the doctrine can apply:

1. There have to be a former suit or issue decided by a competent court.
2. The matter in dispute in the former suit between the parties must also be directly and substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar.

3. The parties in the former suit should be the same parties or parties under whom they or any of them claim, litigating under the same title.

The rationale of the doctrine is that there must be an end to litigation. Justice requires that every matter should be once fairly tried and having been tried once, all litigation about it should be concluded forever between the parties; **Ponsiano Semakula Vs Susane Magala & Ors [1993] KALR 2013.**

[38] The issues in **Civil Suit No.38 of 2012** brought against **Herbert Kimera Rwakiswaza** were as follows;

1. **Whether the plaintiffs were the owners of the suit land.**
2. **Whether the defendants had trespassed on the suit land.**

The issues in the present case were inter alia;

1. **Whether the plaintiffs can sustain this suit on the same piece of land in light of the existing (now) decided civil suit No. 38 of 2012 in the same court.**
2. **Whether the plaintiffs and 391 Others have been customary tenure holders and occupants of the various pieces of land situated in the villages of Muziranduru, Kijayo and Kyendagano, Kiziranfumbi sub county, Hoima District.**
3. **Whether the plaintiffs have any interest in the 1st defendant's registered land.**

[39] However, in **Greenhalgh Vs Mallard [1947]2 ALL ER 255**, a plea of Res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which belonged to the subject matter of litigation and which parties or their privies exercising reasonable diligence might have brought forward at the time. The implication of this authority is that, as can be deduced from the evidence of **PW1** and **PW4** in **Civil Suit No.38 of 2012** whose excerpts I have already reproduced in this judgment, the issue of compensation or claims of loss of properties are points which belonged to the subject matter of litigation for which the parties exercising reasonable diligence might or ought to have brought forward during the trial of **C.S No.38 of 2012.**

[40] In this case, the former suit, **C.S No.38/12** brought against the estate of **Herbert Rwakiswaza Kimera** had a judgement pronounced upon all the issues which are in the instant suit by **Justice Gadenya Wolimbwa** with the following inter alia orders;

- a) *“The plaintiffs’ suit against the defendants is dismissed with costs.*
- b) *The defendants are declared the lawful owners of the land comprised in Bugahya Block 12 plot number 39 and 40.*
- c) *...*
- d) *...*
- e) *An eviction order is thereby issued against the plaintiffs, and they are further ordered to grant vacant possession to the defendants within 60 days from the date of judgment.”*

[41] The plaintiffs in the former suit **C.S No. 38/12** who are the same plaintiffs in the present **Suit No.20/15** had the former suit against the estate of **Herbert Rwakiswaza Kimera** founded on their claim as customary tenants and/or bibanja holders on land comprised in **Bugahya Block 12 plot No.6** which was mutated to **plot 39** and belonged to **Herbert Rwakiswaza Kimera**. The present surviving defendant became the transferee of the portion of land out of the said Block and therefore was claiming under **Herbert Rwakiswaza Kimera**.

[42] Court in the former suit **C.S No. 38/12** pronounced itself on all issues relating to ownership of the said land and dismissed the plaintiffs’ claim thereof as customary owners or bibanja holders. The status of the suit property having been adjudicated upon by a competent court, this suit is rendered **res judicata**. However, the defendant did not plead **res judicata** at the time of filing the present suit because the former suit was still subsisting and pending. Since **Res judicata** bars a party to file a suit where there is a former suit already decided by the court where the matter directly and substantially, the doctrine would not apply in this case because at the time the plaintiffs filed the subsequent present suit, they were not barred by the doctrine as it had not come into operation.

[43] What was in operation was the **Res subjudice** doctrine, the rule that prohibits the trial of a subsequently instituted suit during the subsistence of a previous one when the matter in issue in the subsequent suit is directly and substantially in issue in the previous

suit and both suits are between the same parties or their representatives litigating under the same title; **See S. 6 CPA**. The purpose of this rule is to avoid multiplicity of proceedings and avoidance of a conflict of decisions, thereby giving effect to the rule of **Res judicata**.

[44] Clearly the issues in this suit were substantially in issue in **Civil Suit No.38/2012** as they relate to ownership status of the suit land and whether the plaintiffs had any interest in the suit land. The 1st defendant being a successor of the late **Herbert Rwakiswaza Kimera**, the defendant in **C.S No. 38/2012**, I find that the resolution of issues in **C.S No. 38/2012** conclusively determined the substantial issues of ownership of the suit land and the status of the parties in the present case and they cannot be adjudicated upon again as the parties are bound by the decree in the previous suit. At the time of filing the present suit, it could not be found *res judicata* because there was no matter already adjudicated in which the matter directly and substantially in issue between the same parties litigating under the same title had been heard and finally decided by the court. The present suit was merely **res subjudice** and court ought to have stayed it until the determination of the previous **C.S No.38 of 2012**. Upon the conclusion and determination of **C.S No.38 of 2012**, the plaintiffs ought to have withdrawn the present suit immediately as a way of mitigating costs or risk the suit being untenable.

[45] The plaintiffs having maintained the present suit and the former suit having been adjudicated upon finally, this court would be entitled to find that this suit has been rendered **res judicata** at this stage of determination and therefore untenable.

Application of O.24 r.9 CPR.

[46] Counsel for the defendant submitted and argued that instead of filing a fresh suit against the present defendant as a transferee of the portion of land of **Herbert Kimera Rwakiswaza**, the defendant in the previous **C.S No.38/2012**, the plaintiffs ought to have applied for amendment of the plaint to add the present defendant since a portion of **Herbert**

Rwakiswaza's land had devolved to the present defendant under **O.24 r.9 CPR**.

O.24 r. 9 CPR provides thus;

“9.Procedure in case of an assignment before final order in suit

(1)In other cases of assignment, creation or devolution of any interest during the pendency of a suit, the suit may by leave of the court be continued by or against the person to or upon whom the interest come or devolved.”

[47] In the Indian case of **DHURANDHER PRASAD SINGH VS JAI PRAKASH UNIVERSITY & ORS (2001) 6 Supreme Court case No.534**, the Supreme Court while considering **O.22 r.10** of the **Indian Code of Civil Procedure**, the equivalent of our **O.24 r.9 CPR** opined that;

“The rule considers two situations. It clearly states that a person in whose favour the rights have devolved may continue with the suit or the suit may be continued against the person in whose favour the rights have devolved.”

That **R.10**, the equivalent of our **R.9** is a rule of equity. If somebody steps in the shoes of the defendant by purchasing the property or seeking certain rights in his favour, then the plaintiff may continue his suit against such a party.

[48] It follows therefore, if a party commits a breach of the court injunction order then the other party would not be permitted to suffer if the defendant during the pendency of the suit transfers his rights, then the plaintiff with the permission of the court may continue his suit against such person whom the rights have devolved.

[49] **R.9** therefore is based on the principle that the trial of a suit cannot be brought to an end merely because the interests of a party in the subject matter of the suit have devolved upon another during the pendency but such a suit may be continued with the leave of the court by or against the person upon whom such interest has devolved. But if no such step is taken, the suit may be continued with the original party and the person upon whom the interests have devolved will be bound by and can have the benefit of the decree, as the case may be; **Dhurandher Prasad Singh (supra)**.

[50] In view of **O.24 r.9 CPR** therefore, the plaintiffs in this case could continue with the suit against the defendant by applying to have it (the surviving defendant) added as a co-defendant and they, the plaintiffs

would be entitled to a decree. The 1st defendant/surviving defendant in this case, where the plaintiffs did not take such a step to continue the proceedings against it, the 1st defendant/surviving defendant is bound by and can enjoy the benefit of the steps taken by the plaintiffs to continue with the former defendant (estate of the **Herbert Kimera Rwakiswaza** in **C.S No. 38/12**), that is, the decree in **C.S No.38/12**. The surviving defendant as a transferee or the person who acquired rights under the assignment is bound by the decree, judgment or order passed by the court in **C.S No.38 of 2012**.

O.24 r.9 CPR therefore is a provision that provides that the assignee/transferee can be made a party in case of assignee during the pendency of proceeding. The former **C.S No. 38/12** while pending between the plaintiffs and the estate of the late **Herbert Kimera Rwakiswaza** as the defendant, the 1st defendant in the present suit acquired rights of the suit property by way of assignment and transfer and therefore is bound by and can enjoy the benefit of the decree in **C.S No.38/12**.

Judgment in Rem

- [51] Besides the surviving defendant being bound by and therefore entitled to enjoy the benefit of the decree in **C.S No. 38/12**, the judgment in the **C.S No. 38/12** brought against **Herbert Rwakiswaza Kimera** declared the ownership status of the suit property (from which the present defendant derived his interest in the suit land) as belonging to the estate of **Herbert Rwakiswaza Kimera**, this was conclusive as against the whole world as the judgment of the court in **C.S No.38/12** is a judgment in rem. A judgment in rem is a “judgment which declares, defines or otherwise determines the status of a person or of a thing ie, the **jural** relation of the person or thing for the world generally;” See **Japheth Nzila Muangi Vs Kenya Safari Lodges and Hotels Ltd [2008] e KLR**. It is a judgment which is conclusive not to only against the parties to it but also against the world.
- [52] The effect of a judgment in rem was held in **SAROJI GANDESHA VS TRANSROAD LTD S.C.C.A NO. 13 OF 2009** as to bind all persons even when they are not parties to the proceedings and are stopped from averring that the status of persons or things or the right to title to property are other than what the court has by its judgment declared.

[53] In the instant case, it follows that the judgment in **C.S No. 38/12** amounted to a judgment in rem, logically it was binding as against all the parties to that suit and 3rd parties, including the present defendant, and conclusive as against the whole world that the entities ordered as affected by order of court were so entitled or disentitled as the case may be regardless of whether they were parties to the suit or not.

[54] The plaintiffs in this case were adjudged to have had no interest whatsoever in the suit land, The land comprised in **LRV 1826 plot 6 Bugahya Block 12 at Kabwoya and Muziranduru** belonged to the defendant **Herbert Rwakiswaza** from whom the 1st defendant derived his interest. The plaintiffs could not therefore sustain the present suit as the same piece of land in light of the decided **C.S No. 38 of 2012**. The first issue is in the premises found in the negative and therefore in favour of the surviving defendant in the present suit.

Issues 2, 3 and 4: Whether the plaintiffs and 391 Others have any interest in the various pieces of land situated in the villages of Muziranduru, Kijayo and Kyendagano, Kiziranfumbi sub county Hoima District and in the defendant's registered land.

[55] As already observed in this judgment, prior to the assignment and transfer of land comprised in **LRV 1826 Folio 16 plot No.39 and 40 Bugahya, Block 12** in favour of the defendant, the entire suit land comprised of **LRV 1826 Folio 16 plot 6 Bugahya Block 12** situated in the village of Muziranduru, Kijayo, Kyendagano and other villages in which the plaintiffs' claimed to had been customary tenure holders of various pieces of land interests/bibanjas, was owned by **Herbert Kimera Rwakiswaza**. As already found, in **C.S No. 38/12** before this court, the entire land was decreed to the estate of the late **Herbert Kimera Rwakiswaza**. The issues in this suit relating to the ownership status of the suit land and the parties ie whether the plaintiffs had any interest in the suit land were substantially in issue in **Civil Suit No.38/2012**.

[56] I find that the present issues **2, 3 and 4** were answered by the resolutions of the 2 issues in **C.S No.38/12**. The plaintiffs and the 391 Others have no interest whatsoever in the various pieces of land situated in Muziranduru, Kijayo and Kyendagano in Kiziranfumbi,

Hoima district and more so, in the 1st defendant's land that formed part of the suit land.

Issue No.5: Whether the plaintiffs and 392 Others suffered loss of household properties, damage and destruction to their homesteads, gardens accruing from violation of the court order in C.S No.038 of 2012.

[57] Counsel for the plaintiffs submitted that the injunction issued by court in **C.S No. 38/12** extended to all persons claiming or deriving from the late **Kimera Rwakiswaza** including the defendant. That the plaintiffs led evidence in **C.S No. 38/12** against the late **Rwakiswaza Kimera** that they owned unregistered interests in land at Muziranduru, Kyendagano, Kijayo and other villages in Kabwoya sub county, Hoima district. That whilst the said suit was pending determination, the defendant (surviving defendant) with the support of police caused destruction of homes and plantations, gardens, foods, household properties and animals in total abuse and violation of the injunction issued by this court.

[58] Counsel concluded that the unregistered interests and developments of the plaintiffs' destroyed by the 1st defendant are not affected by the judgment passed in **C.S No.38/2012**.

[59] Counsel for the defendant on the other hand submitted that by virtue of the pleadings of the plaintiffs and the fact of the allegation that the proceedings arise out of violation of a court order, the filing this suit is prohibited by the law. That the violation of the court order, should have been handled by execution of **C.S No. 38/2012** through any of the relevant modes of execution provided for in **O.22 CPR** and not filing a separate suit. That the question of whether the defendant was a representative of **Herbert Rwakiswaza Kimera**, the defendant in **C.S. No. 38/2012**, also ought to have been determined by the court to which an application for execution of the order would be made as provided in **S.34 (1) & (3) CPA**.

[60] As regards the properties alleged to have been destroyed, counsel submitted that there was no evidence that any of the properties was in fact destroyed. That there was no evidence of any destruction of the alleged property of any of the plaintiffs. That the presented

photographs (**P.Exh.1**) do not show evidence of destruction but evidence of existing fields. That the evidence does not indicate when and where the photographs were taken.

[61] Lastly, that at the visit of locus in quo, the plaintiffs failed to prove any eviction. But that on the contrary, there was physical evidence of existence of various illegal fields within the land of the defendant.

Photograph Evidence

[62] The 1st plaintiff (**PW1**) who is one of the representatives of the other 391 plaintiffs testified that he and other plaintiffs were resident in the villages of Kijayo, Muziranduru, Kyendagano and other villages in Kabwoya sub county, Hoima district and that their houses, banana plantations, various crops and animals were destroyed by the 1st defendant with support from the Hoima police.

[63] In support of his evidence, the plaintiffs adduced and exhibited a bundle of photos (**P.Exh.1**) depicting the claimed destroyed properties of the plaintiffs. **PW1** identified the plaintiffs' plantations and gardens, houses; both permanent, semi-permanent and temporary which according to him were later destroyed, slashed and cut, as well as the gathering of residents including two occasions when the then trial judge was present during the initial locus visits.

[64] At **page 22 of the typed proceedings**, **PW1** testified that the photos depict houses, banana plantations that were destroyed on the suit land. At **page 30**, during cross examination, he stated thus;

“The photos were taken by myself after the destruction of our bananas... I am the one who took the photos...I took the photos after the destruction of the properties.”

[65] As conceded by **PW1**, during cross examination, the photos were neither dated nor did they show any location of the scenes. It should be noted that during the proceedings of **C.S No. 38/2012**, similar allegations of destruction of properties to wit homesteads, crops and animals were made. In the absence of dates when the present photos in this suit were taken therefore, in my view, the allegations of the defendant that the photos are fabricated evidence in terms of the applicable period becomes valid. This becomes so when these photos are considered alongside the defendants adduced evidence. It is

therefore difficult for court to ascertain whether the photos refers to that period before the injunction order or thereafter.

- [66] **Rajasecaran Ramados** (DW1), the defendant's Agricultural manager testified that the land purchased by the defendant is that located at Kizranfumbi and was total bush. The defendant took possession by 2013 and opened the boundaries and started clearing using bull dozers, tractors etc. However, that because the clearing was taking some time, people infiltrated and started having gardens in the defendant's titled land. Eventually, the defendant had to compensate the owners of these gardens though they were trespassers to avoid friction. The defendant was able to compensate 164 families and those who refused compensation have been left to stay.
- [67] In cross examination, **DW1** explained that at the time of purchase, the land had no human settlement because the vendor **Kimera Rwakiswaza** was rearing and grazing cattle thereon.
- [68] As can be gathered from **DW1's** evidence, the clearing of the suit land was use of Bull dozers, tractors etc. The 1st plaintiff **Stephen Buryahika** (PW1) also alluded to tractors and graders to had been used to destroy their properties during their eviction.
- [69] I have perused the bundle of photos as contained in **P.Exh.1**. None of the pictures depict tractors, bull dozers or graders in action destroying crops, plantations and houses. The photos depict existing fields as counsel for the defendant observed. As regards homesteads, the photos majorly show temporary grass thatched houses and semi-permanent houses unfinished in nature, implying that the structures are recent and in a way support and corroborate **DW1's** evidence that during the clearing of the land in around 2013, certain people infiltrated into the land and formed gardens and settlements. The settlements seen in the photos, **pages 30-49** and **103-106** (P.Exh.1) are not consistent with **PW1's** claims that he and other plaintiffs had been in occupation of the suit land since 1980s. Photos at **pages 87-89** are not consistent with eviction by use of tractors and bull dozers. The only tractor shown at **pages 98** and **99** is for transportation of either workers/labourers or as a mere other form of transport.
- [70] In conclusion I find that the photograph evidence adduced by the plaintiffs were not relevant to the plaintiffs' claims. The defendant's

version of the case reflect the locus findings that was conducted on 10/12/2021. There are physical pocket portions of land occupied by families with gardens of food crops scattered all over the defendant's sugar plantations. These were families who refused compensation.

- [71] The defendant presented a list of the persons who accepted and took compensation whose fields were later ploughed (**D.Exh.4**). **DW1** explained the repetition of some of the names because some had more than one field and had to be compensated more than once. Those who refused to be compensated were left and are co-existing with the defendant. In any case, by the statement of the locus witness, **Tumusiime Monday Edward** at locus stating that "*The Judge's order was fully complied with*" is evidence that whatever destruction that could have taken place occurred during **Kimera Rwakiswaza's** tenure and not when the defendant took charge.
- [72] Besides, the fact that the plaintiffs had already been declared trespassers on the suit land by court in **C.S No.38/2012**, it follows that the suit property was vested in the defendant and the defendant cannot be held to account for the illegal property found on the land which land has never at any one stage vested in the plaintiffs, the trespassers. The plaintiffs would not be permitted to benefit from their own wrong of trespass. By the plaintiffs filing the present suit over allegedly destroyed property, adduced in evidence **C.S No.38/2012** was a designed attempt to enable them reap twice from the defendant in the former **C.S No.38/12** and the defendant in the present **Civil Suit No.20 of 2015** using court which as counsel for the defendant concluded, is a clear abuse of the process of court.

Violation of an Injunction Order

- [73] It is settled law that an injunction is an equitable remedy in the form of a court order that compels a party to do or refrain from specific acts. It is a court order which refrains one of the parties to a suit in equity from doing or permitting others who are under his control to do an act which is unjust to the other party. An injunction clearly forbids a certain type of conduct. It is a remedy that originated in the English courts of Equity.
- [74] Orders of injunction are passed in view of the inherent jurisdiction of the court under **O.41 CPR** which sets out the various circumstances in

which an order of injunction can be passed. As well known, these orders take many forms and usually are prohibitory in nature and meant to preserve the subject of the dispute or prevent damage or loss to the party applying.

[75] The question is, what are the options or remedies available to a party who has an order of injunction in her/his favour and finds the defendant disobeying and breaching the order?

(a) Contempt of court; In **Clarke Vs Chadburn (1985) 1 WLR 78**, Sir Robert Megarry V.C observed;

“I need not cite authority for the proposition that it is of high importance that orders of the court should be obeyed. Wilful disobedience to an order of the court is punishable as a contempt of court, and I feel no doubt that such disobedience, may properly be described as being illegal...”

(b) Order of restoration;

In **Sujit Pal Vs Prabir KumanSun & Ors 1985 [SCC Online Cal 14]**, a Division Bench on the Calcutta High Court took the following view;

“There, the defendant forcefully dispossessed the plaintiff in violation of the Order of Injunction and took possession of the suit property. The court directed the restoration of possession to the plaintiff with the aid of police.”

The court observed that no technicality can prevent the court from doing justice in exercise of its inherent powers. This was necessary, it observed, to prevent the abuse of process of law.

[76] In Uganda, the usual remedy available to apply for holding the violator guilty of civil contempt has been to pass orders for detention of the contemnor in civil prison or by way of sequestration which is a strong deterrent and usually results in the contemnor reversing the transaction or step taken in order to avoid the stringent punishment of imprisonment. In cases of companies, the Directors can be hauled up for contempt and punished; **DR. CHARLES TWESIGYE VS KYAMBOGO UNIVERSITY H.C.M.A NO.120/2017[2017] UGHCCD 193.**

[77] It is apparent therefore from the foregoing, that since in the instant case, the defendant was alleged to be a representative of **Herbert Rwakiswaza Kimera** in **C.S N o. 38/12** against whom the injunction order was made, the violation of the court order should or ought to have been handled by the court proceeding with **Civil Suit**

No.038/2012 under inherent powers of **S.98 CPA** and hold the defendant in contempt of its order to ensure that the ends of justice are met and prevent abuse of the process of the court but not for the plaintiffs to file a separate suit.

- [78] It must however, also be noted that since the Orders of injunction operate only till the disposal of the suit finally, in the event that there is a transaction, or act which is contrary to the injunction, the same would not take effect if the suit is decreed in favour of the plaintiff. But in the event the suit of the plaintiff fails as it occurred in the present suit, the necessary consequence is that the Order itself of injunction comes to an end and in that event the transaction or act pending the suit would continue and take effect.
- [79] The plaintiffs' anchoring of the present suit on an injunction that came to an end when the **C.S No.38/12** from which it arose was determined in favour of the estate of **Herbert Rwakiswaza .K.** from whom the present defendant derived his interest, also renders the plaintiffs' present cause of action untenable.
- [80] The issue of whether the certificate of title of the suit land was obtained fraudulently or whether it was comprised in **Block 6** or **12** was settled in **C.S No. 38/12**, in particular, that the error regarding the numbering of the block number for the suit land was corrected to read **Block 12**.As regards the impeachment of the suit land certificate of title, the plaintiffs in this suit are not challenging the defendant's certificate of title. They neither pleaded nor proved fraud as required by the mandatory provisions of **O.6 r.30 CPR**. Besides **C.S No. 38/2012** had settled the issue of ownership in favour of **Herbert Rwakiswaza** whose decree went to the benefit of the defendant as his successor in title.
- [81] In the premises, I find the arguments by counsel for the plaintiffs on the above issues regarding the certificate of title and its block number having no basis.
- [82] In conclusion, I find that the plaintiffs failed to adduce proof that they have suffered loss and destruction of properties to the defendant. The hyped report of the D.P.C Hoima (**D.Exh.6**) concluded that when a team of police officers who included the D.P.C visited the disputed land found bulldozers clearing the undeveloped land. The allegations that homesteads and gardens were targeted by the Bull dozers were false.

The report (**D.Exh.6**) is consistent with the photos presented by the plaintiffs comprised in **P.Exh.1. Issue No.5 is in the premises found in the negative**, that is, in favour of the defendant.

[83] In the premises where court has found that there is no evidence that the plaintiff suffered loss of property and the findings in **C.S No. 38/2012** that the plaintiffs were trespassers on the suit land, the eviction or non-eviction of the plaintiffs from the suit land is immaterial and of no consequence. **This disposes of issue No.6 accordingly.**

Issue No.7: What remedies are available to the parties.

[84] Following the findings of the court that the issues in this suit were substantially in issue in **C.S No.38/12** brought against **Herbert Rwakiswaza Kimera** where the suit land was declared to **Herbert Rwakiswaza Kimera** from whom the 1st defendant derives his interest and that the plaintiffs were trespassers, it follows that the plaintiffs have no interest whatsoever in the suit land. 2ndly, the plaintiffs having failed to prove loss of property to the defendant, they are not entitled to any of the sought remedies. Besides, the assessment of the alleged loss made by **Shingiru Didas** (PW2) a businessman consultant, **Nabukenya Margret** (PW3) an Agricultural consultant and **Acidiri Baron** (PW4) a Technician holder of a Higher Diploma from Uganda Technical College, Bushenyi, were of no evidential value, for the report made by these witnesses were not from persons qualified to make crop loss assessments and property valuer's reports. Both **PW2** and **PW3** admitted that they are neither valuers nor engineers in the professional sense and therefore the valuation reports **P.Exh 2 (e) and (b)** which they co-authored are found to have been of no evidential value.

[85] In conclusion, the plaintiffs failed to prove their claims to the standard requirements of the law. The plaintiffs have no interest whatsoever in the defendant's suit land. The plaintiffs' suit is accordingly dismissed with costs to the 1st defendant/surviving defendant in the suit.

Dated at Masindi this 6th day of **May 2022.**

Byaruhanga Jesse Rugyema
JUDGE