

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[FAMILY DIVISION]

MISCELLANEOUS APPLICATION NO. 66 OF 2013

(Arising Out Of Divorce Cause No. 64 of 2012)

MWANJE ENOCKAPPLICANT

VERSUS

NAKAMATE DEBORAH MWANJE.....RESPONDENT

BEFORE HON LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This is an application by Notice of Motion brought under section 98 of the Civil Procedure Act and Order 52 rule 1 of the Civil Procedure Rules (CPR) for orders that the Divorce Cause before this court be struck out on grounds of *res judicata*, matters therein having been substantially heard and determined in the Chief Magistrate's Court of Makindye vide Divorce Cause No 15/2011; and that the respondent pays the costs of the application.

The application is supported by the affidavit of the applicant Mwanje Enock and the grounds are briefly that:-

1. The respondent filed *Divorce Cause No 15/2011 Mwanje Enock V Nakamate Deborah* in the Chief Magistrate's Court of Makindye.
2. The matter was substantially heard and determined by the said court and a decree *nisi* was granted on the 22nd day of February 2012.
3. Upon the respondent's application, the decree *nisi* was set aside by court on allegations that there was matrimonial property comprised in Block 255 Plot 646 which the applicant never mentioned in his petition in the lower court, and the court

directed the respondent to submit evidence as to the said allegations, which the respondent failed to adduce.

4. A ruling on the above matter is pending Her Worship Flavia Nabakooza.
5. The respondent decided to abandon the ongoing proceedings and improperly filed Divorce Cause No 64/2012 which is an abuse of court process.
6. The interests of justice dictate that Divorce Cause No 64/2012 be dismissed on grounds of *res judicata*, with costs to the applicant to allow the lower court to conclude Divorce Cause No 15/2011, a petition brought by the applicant.

The application was opposed by the respondent Nakamate Deborah Mwanje through her affidavit in reply. Counsel filed written submissions within time schedules set by court.

The issue for determination is whether Divorce Cause No 64/2012 pending before this court is *res judicata*.

Section 7 of the Civil Procedure Act Cap 71 states that,

“ No court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties, or between 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 court.”

In **Maniraguha Gashumba V Sam Nkundiye Civil Appeal No 23/2005** court held that 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 the 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. It was also held that a court before which a plea of *res judicata* is raised may rely on a judgement of the first court if it is produced without objection.

In **Absolom Batumya V Sentalo Moses & Anor Civil Revision No 07/2009**, it was held that a suit will be *res judicata* for as long as that court is competent and has finally determined the

suit. If that particular court had the jurisdiction to entertain the suit and substantively heard it and delivered judgement on the same basis of evidence adduced, the matter is properly *res judicata*.

In **Nakiridde V Hotel International Ltd [1987] HCB 85**, court reinstated a dismissed application and declined to apply the doctrine of *res judicata* where the first application had merely been dismissed and not decided finally. In **Isaac Busulwa V Ibrahim Kakinda [1979] HCB 179**, the prior suit had been dismissed on a preliminary point of law (PO). Kantinti J, as he then was, held that the dismissal of a suit on a PO, not based on the merits of the case, does not bar a subsequent suit on the same facts and issues the same parties.

It is now settled law therefore that for a matter to be *res judicata*, the matter ought to have been heard and determined. Where the merits of the matter were not heard and determined, the doctrine of *res judicata* does not apply.

In this case the adduced evidence on record reveals that the applicant filed Divorce Cause No 15/2011 in the Chief Magistrate's Court of Makindye. A copy of the petition is annexed to his affidavit as **A**. Annexure **C** to his affidavit shows that a decree *nisi* was issued in favour of the petitioner (applicant in this application) on 22nd February 2012. Annexure **C** which is a copy of the record of proceedings in Miscellaneous Application No 15/2011 reveals that the judgement made with the orders in Divorce Cause No 15/2011 were set aside under Order 9 rule 12 of the CPR at the respondent's request on allegations that there was matrimonial property comprised in Block 255 Plot 646 which the applicant never mentioned in his petition.

The same record of proceedings however shows that on 12/12/12 the petitioner/applicant requested the trial magistrate to reinstate the suit on grounds that the respondent in Divorce Cause No 15/2011 had failed to produce evidence of the existence of matrimonial property neither did they respond to the petition. In response the respondent's counsel applied to transfer the file to the High Court, or alternatively, without prejudice, to stay its orders issued in Miscellaneous Application 97/2012 until determination of Divorce Cause No 64/2012. The trial magistrate adjourned the matter to 25/02/13 for ruling.

The record shows that the trial Magistrate eventually reinstated the matter for hearing *inter partes* when the respondent in Divorce Cause No 15/2011 failed to produce evidence of the alleged existence of matrimonial property, and on establishing from the petitioner's evidence that the so called property comprised in Kyadondo Block 255 Plot 646 land at Munyonyo was registered in the names of AKS Services Ltd on 24/01/11 before the petition was filed. The record also shows that the same respondent had failed to respond to the petition.

In her judgement, a copy of which was annexed as **D**, the trial Magistrate dissolved the marriage on grounds of the respondent's adultery and desertion, granted the custody of the infant Ethan Mwanje to the respondent, and granted the petitioner unlimited access to the issue of the marriage. A copy of the decree *nisi* dated 25/02/2013 reflecting the trial Magistrate's decisions is also on the court record, and so is a copy of the decree absolute issued by the same court dated 17/10/2013.

In that regard I would agree with the applicant that this matter is *res judicata* having been resolved on the merits by a court of competent jurisdiction.

I can only add that the respondent's insisting on filing another suit on the same matter in the High Court when the same was disposed of by a court of competent jurisdiction amounts to abuse of court process. This is more so, considering that the respondent had initially caused the trial Magistrate to set aside the initial *decree nisi* on grounds that matrimonial property had not been mentioned. Yet, she did not bother to avail court evidence of the existence of the matrimonial property when requested, or to rebut the evidence availed by the petitioner (applicant in this case) on the non existence of the matrimonial property. She instead filed a new suit in this court based on the same facts. Her counsel's submissions on this application are silent on the issue of the existence of matrimonial property yet it is vital to justifying the filing of the suit to a higher court after a lower court had deliberated on it.

In **Kamurasi Charles V Accord Properties & Anor Civil Appeal No. 3 of 1996 [2000] UGSC 11**, counsel for the applicant filed two suits in the High Court each naming two different defendants. The two suits were given the same number in the registry. In an amended plaint, which only related to the second suit, the same firm of Advocates did, without reference to the parties in the first suit, amend the particulars of the plaint which had

been served on the defendant. Counsel did not refer to the plaint or the parties therein. The subsequent proceedings were conducted as if only one plaint had been filed against one set of defendants. During the perusal of the record of proceedings and consideration of submissions of parties, the trial Judge discovered there had been two plaints filed in court on behalf of the applicant. The learned Judge considered this and the silence on the matter by the applicant's counsel as tantamount to abuse of the process of court. He ordered the second plaint to be struck out with costs against the applicant's counsel. The Supreme Court dismissed the appeal against the trial Judge's decision and agreed with the trial Judge that there was an abuse of the process of court.

I similarly find that the respondent's filing of another suit in this Court based on the alleged existence of matrimonial property when the same applicant failed to substantiate the same matter before the lower court when given opportunity to do so tantamounts to abuse of court process.

Thus, based on the foregoing authorities and the adduced evidence, it is accordingly ordered as follows:-

- i) Divorce Cause No. 64/2012 pending before this court is struck out on grounds of *res judicata*, matters therein having been substantially heard and determined in the Chief Magistrate's Court of Makindye vide Divorce Cause No 15/2011.
- ii) The respondent will pay the costs of this application.

Dated this 25th day of August 2015.

Percy Night Tuhaise.

Judge.