

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA-MAKINDYE
(FAMILY DIVISION)

CIVIL REVISION No. 02 OF 2017

(ARISING FROM REVISION OF NABWERU CS. No 449 OF 2008)

NALUJJA ROBINAH PLAINTIFF
VERSUS

KYAZIKE SUSAN DEFENDANT

Before HON. LADY JUSTICE KETRAH KITARIISIBWA KATUNGUKA

RULING

Introduction:

[1] This matter was forwarded by the Chief Magistrate’s Court of Nabweru for revision on grounds that the trial Chief Magistrate who heard the matter had acted with material irregularity. The dispute is over the estate of the Late Ssebatta Christopher to whom the plaintiff is an executrix. The defendant claims she is entitled to the suit property at Kyadondo Block 448 Plot 447 and hence her occupation of the said property.

[2] The points of irregularity raised are that the dispute was settled and judgment passed in favour of the plaintiff in the LC 1 Court which lacked jurisdiction. Counsel for the defendant raised a preliminary objection that the matter is res judicata, which the trial magistrate overruled and ordered for costs against the defendant on grounds that the matter was already fixed for hearing and the LC had no jurisdiction. The trial proceeded and the trial Chief Magistrate admitted the judgment of the same LC 1 court as an exhibit for the plaintiff in evidence.

Background:

[3] It was the applicant/plaintiff’s case at trial that she is the executrix of the will of the late Ssebatta Christopher who died on 15th May 1994 and was survived by

two widows namely Jane Namazzi and Mama Nakiyingi and nine children including the plaintiff. The defendant is not related to the late Ssebatta but is a granddaughter of the Late Namazzi who passed on in 2004, 10 years after Ssebatta's death; the late Ssebatta left several properties including two houses
5 comprised in Kyadondo Block 448 Plot 447, to be occupied by his two widows. In the said will, he bequeathed the suit premises to his widow the Late Namazzi to occupy the house undisturbed until she retired or died. The defendant was not mentioned in the will.

10 After the death of the Late Namazzi, the defendant requested and was permitted by the plaintiff to stay on the suit premises. The defendant later started claiming that the suit land belonged to her having acquired it as a beneficial share in the estate of the late Namazzi. The plaintiff then sued the defendant in Kiyaga Zone LC 1 court wherein judgment was passed in his favour. The defendant however
15 refused to vacate the premises in violation of the court order and a suit was subsequently filed in the Chief Magistrate's Court at Nabweru for a declaration that the suit property belongs to the estate of the late Ssebatta and not the late Namazzi, general damages for trespass and eviction of the defendant from the suit land as well as costs.

20 [4] The defendant denied all the allegations and averred that she is the granddaughter of the late Namazzi who was the owner of the kibanja and the houses and the same were given to her by her late grandmother and the property thus does not belong to the estate of the late Ssebatta. The defendant further averred that she
25 was brought up by the late Namazzi since childhood and stayed with her until 2005 when she died and she remained on the suit plot with overt possession since then; denied the alleged trespass and that the plaintiff allowed her to continue staying on the premises; therefor prayed for dismissal of the suit with costs.

Representation:

[5] The applicant/plaintiff is represented by Counsel Charles Mbogo of M/S Mbogo & Co. Advocates while the respondent/defendant is represented by Counsel Kato Ramadhan of M/S Niwagaba & Mwebesa Advocates. Counsel for the applicant filed written submissions on 27th February 2019.

On 21th February 2019 when the matter came up court directed that written submissions in font 14 double space of 2 pages be filed as follows; for the applicant by 25/02/2019, for the respondent by 14/03/2019 and rejoinder if any by the applicant by 5/3/2019. Applicant's counsel filed 2 page submissions dated 25/02/2019 on 27/02/2019, two days late. The respondent's counsel did not file any submissions.

Resolution of the case:

Facts

[6] The gist of the application as court understands it is that the applicant sought to evict the respondent from the suit property on grounds that it belongs to the estate of the late Ssebatta. A suit was filed in the LC 1 court by the applicant and judgment given in her favour. The respondent defied the court order and the applicant then filed a suit in the chief magistrate's court. The respondent's counsel raised a preliminary objection that the matter was res judicata which was overruled by the trial magistrate on grounds that the matter was one for land and eviction of the defendant so the LC 1 court lacked jurisdiction over succession matters and as such the illegality could not be upheld. The court however admitted the LC 1 judgment into evidence.

The Chief Magistrate HW Atukwasa Justine states the irregularities as;

- i. the LC1 of Kiyaga zone LC1 tried the matter and passed judgment in favour of the plaintiff without jurisdiction;

- ii. The issue was raised by counsel for the defendant as a preliminary objection that the matter is resjudicata. The trial magistrate then over ruled him and ordered for costs against the defendant on grounds that the matter was already fixed for hearing and the LC had no jurisdiction with no orders;
- 5 iii. The trial proceeded and the trial Chief Magistrate admitted the judgement of the same LC1 Court as an exhibit for the Plaintiff in evidence.

The issue for determination now is *whether the trial magistrate acted with material irregularity when he ordered that the LC 1 had no jurisdiction made*
10 *no other orders and proceeded to hear the matter and accept the judgment of the LC 1 as evidence.*

Resolution of Issues:

Position of the Law

15 [7] Section 83 of the CPA provides that ‘The High Court may call for the record of any case which has been determined under this Act by any magistrate’s court, and if that court appears to have . . . acted in the exercise of its jurisdiction illegally or with material irregularity or injustice, the High Court may revise the case and may make such order in it as it thinks fit; but no such power of revision
20 shall be exercised— unless the parties shall first be given the opportunity of being heard . . . ’(see also the case of *Attorney General v James Mark Kamoga SCCA No 8 of 2004.*

[8] The defendant in this matter raised a preliminary objection at the stage of hearing
25 the plaintiff’s case that the matter was res judicata having been heard by the LC 1 court and as such the suit should be struck out. The court overruled the application with costs on the basis that the LC 1 court lacked jurisdiction.

O.6 r 28 of the CPR provides that any party shall be entitled to raise by his or her
30 pleading any point of law, and any point so raised shall be disposed of by the

court at or after the hearing; except that by consent of the parties, or by order of the court on the application of either party, a point of law may be set down for hearing and disposed of at any time before the hearing. Thus a party may raise a preliminary objection any time before hearing.

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[9] The legal principle of res judicata under S.7 of the Civil Procedure Act and section 210 of the Magistrates Court Act prohibits courts from trying matters between the same persons that had already been finally determined by a court of competent jurisdiction otherwise litigation would never end as it would be a way of vexing individuals and abusing court process. (see Court of Appeal of Uganda in **Ponsiano Semakula versus Susane Magala & Others, 1993 KALR P.213** also cited with approval in the case of Kafeero Sentongo vs Shell(U) Limited and Uganda Petroleum Co. Ltd CACApp. No. 50/2003) that ‘ . . . *The test whether or not a suit is barred by **res-judicata** appears to be that the plaintiff in the second suit trying to bring before the 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 proceedings and which has been adjudicated upon’ and Lt **David Kabareebe v Maj Prossy Nalweyiso CACA No.34 of 2003** where it was held that ‘ *to give effect to a plea of res judicata, the matter directly and substantially in issue in the suit must have been heard and finally decided in the former suit . It simply means nothing more than that the person shall not be heard to say the same thing twice over in successive litigations’*)*

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[10] In the present matter, counsel for the applicant stated that the Local Council Courts do not have jurisdiction to entertain succession matters. Page 21 of the record shows that the applicant sued the respondent in the LC 1 Court for failure to vacate the houses and plot belonging to the late Ssebatta.

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The essentials for a plea of res judicata are that the former judgment must be of a court of competent jurisdiction, directly speaking upon a matter in question in the subsequent suit and between the same parties.

5 [11] The Judgment of the LC1 dated 25/8 2005 shows that the issues framed were and I quote;

‘The LC1 Court put the following three questions to Susan;

i. Whether the late Namazzi left a will?

10 ***ii. Whether she was the heir of the late Namazzi? To these questions, Susan answered in the negative.***

iii. Who is the heir of the deceased?

Susan replied that she did not know’

The ruling of the court was and I quote;

15 ***‘After considering the evidence of both parties;***

1. Susan has no claim to the late Ssebatta’s property

2. She has no documentary proof regarding the late Ssebatta’s properties

3. She has no witnesses to support her case that she has any beneficial share in the premises.

20 ***Because of the above reasons, L.C.1 Court has found that the late NAMAZZI’s property which were bequeathed to her by her late husband Ssebatta to hold on to the same during her life and without NAMAZZI stating otherwise, those things revert to the children of the late Christopher Ssebatta’’***

25 [12] The above shows that what was considered by the LC1 Court was succession.

Section 4 of the LC Act provides that every Local Council court shall have jurisdiction for the trial and determination of . . . causes and matters of a civil nature specified in the second schedule to this Act. The second schedule sets out; Debts, Contracts, assault or assault and battery, conversion, damage to property
30 and trespass.

[13] Succession is not one of the causes the LC1 court had jurisdiction to try. The matter therefore had not been tried by a competent court so the plea of res judicata could not apply. The trial magistrate therefore rightly dismissed the point of law because whatever a court purports to do without jurisdiction is a nullity-
5 the proceedings, judgment and all. The dictionary definition of ‘nullity’ is a thing of no importance or worth or legally void’.

[14] A court cannot exercise a jurisdiction that is not conferred upon it by law. It is settled law that a judgment of a court without jurisdiction is a nullity, has no
10 worth or importance and the person so affected is entitled to have it set aside ex as of right (see **Dima Dornic Poro v Inyani Godfrey & Apiku Martin High Court Civil Appeal No. 0017 Of 2016, also the case of Desai v Warsaw (1967) Ea 351 And Karolo Mubiru And 21 Ors Vs Edmund Kayiwa [1979] HCB;**).

[15] The trial magistrate therefore should have set aside the said judgment by the LC1 court and should not have allowed it to be part of the evidence. Such proceedings and judgment could only be used to determine the plea of res judicata and nothing else. (see Halsbury’s Laws of England (3rd Edition) para.388:‘*In order to ascertain what was in issue between the parties in the
20 earlier proceedings, the judgment itself must of course be looked at and the verdict, if any, on which it is founded; and where there have been pleadings, these should also be examined being in fact part of the record.* (see also the cases of **Maniraguha Gashumba v Sam Nkundiye CIVIL APPEAL NO. 23 OF 2005,Court of Appeal – 2014,**and **Ponsiano Semakula versus Susane Magala & Others, 1993 KALR P.213.**

[16] The last issue is whether the learned Chief Magistrate irregularly ordered for costs against the Defendant on grounds that the matter was already fixed for hearing. The question to be answered is when should a preliminary point of law
30 be raised? It is an established position of the law that once an illegality is brought

to the attention of court it should not be perpetuated and, or condoned. (see **Makula International Ltd Vs His Eminence Cardinal Nsubuga & Anor (CIVIL APPEAL NO. 4 OF 1981) [1982] UGSC 2**. Illegality therefore should be brought out to court any time before judgment but whoever brings it must show that he did not know at the time of pleadings, otherwise it must be pleaded because like in this case, for res judicata, a person so affected should have an opportunity of putting forward his/her contentions against such a plea.(see the case of **Obura vs Koome [2001] EA 177**. In this case the record seems to show that the point of law was raised at the beginning of the hearing. In my considered view just because a case has been fixed for hearing does not mean that the process is cast in stone but whoever raises a point of law depending on the outcome may be liable to pay costs like in this case.

I do not find the order for costs irregular.

15 Conclusion:

- i. The trial magistrate acted with material irregularity when he failed to set aside the LC1 judgment and instead accepted it as evidence for the plaintiff.
- ii. The order for costs was not irregular.
- iii. Since the LC 1 judgment was void and of no consequence, the Chief Magistrate's court shall determine the matter.

On the premises I make the following Orders

- (1) The proceedings and judgment of the LC1 Court are set aside;
- (2) Let CS 449/2008 be heard and determined on its merits;
- (3) The order for costs was not irregular.
- (4) The costs stay in the suit.

Dated this 5th Day of April 2019

Ketrah Kitariisibwa Katunguka

Judge