

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASINDI
CIVIL SUIT NO. 005 OF 2021

5 **BASEMEREZA ESAU**
 (Administrator of the Estate of
Late ESEZA GANUKURA) PLAINTIFF

VERSUS

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 1. BYAKAGABA MOSES ATEENYI
 2. KATUSABE ANDREW
 (Administrators of the Estate of the Late
 ENOCK MUKIDI) DEFENDANTS

15

BEFORE: Hon Justice Isah Serunkuma

20 **RULING ON THE PRELIMINARY POINT OF LAW**

BACKGROUND

25 The Plaintiff sued the Defendant for the cancellation and /or revocation of letters of administration granted to the Administrators of the Estate of the Late Enock Mukidi on grounds that the deceased's will include a portion of his late mother's land. This was as had been decreed by court in **Civil Appeal MH No. 25 of 1989**.

 The Plaintiff's facts are that before their deaths, the Late Ganukura Eseza sued the Late Enock Mukidi for trespass to land which arose from an attempt by the latter to lease the entire family land measuring 69 hectares (172 acres). The Late Eseza Ganukura sued on the basis that this

included 100 acres that had been allocated to her by their father during his lifetime. The original suit in the Magistrate Grade 11's court was determined in favour of the Late Enock Mukidi. The Late Eseza Ganukura appealed the decision at the Chief Magistrate's Court at Masindi vide Civil Appeal No. 025 of 1989. It was determined in favour of the Late Eseza Ganukura, whose estate the
5 2nd Respondent manages. The Plaintiff now alleges that in the execution of his will, the Late Enock Mukidi erroneously included the 100 acres and the Defendants based on the said will to apply for probate.

The Defendant applied for the above suit to be struck out on the basis that the same is Res Judicata as it is between the same parties and in respect to the same subject matter, the suit land.

10 Representations

Counsel Simon Kasangaki of M/S Kasangaki & Co. Advocates appeared for the plaintiff, while Counsel Moses Tugume of M/S Tugume – Byensi & Co. Advocates represented the defendants.

Submissions of the Parties

Counsel for the Defendants submitted that this matter is res judicata as it relates to a cause of
15 action that was fully litigated upon by courts of competent jurisdiction and the cause of action relates to the same subject matter, which is the suit land. They submitted that the Plaintiff sued the late Enock Mukidi in respect to the suit land and the matter was determined vide Civil Suit No. MH 10/89. The said decision was appealed and a decree was accordingly issued. Even the subsequent applications in respect to execution have been determined.

20 Accordingly, they submitted that the current suit is illegal and an abuse of the court process for the estate of the Late Eseza Ganukura to bring another suit against the estate of the Late Enock Mukidi over a matter that was adjudicated upon by courts of competent jurisdiction 33 years ago and thus it is res judicata.

In response, the Plaintiff submits that the current suit is in respect to the fraudulent inclusion of
25 the late Eseza Ganukura's land in the will of the Late Enock Mukidi. They contend that there is a just cause for revocation and/or annulment of the letters of administration granted to the Defendants on grounds that they fraudulently included the Late Ganukura's land. Further, that the

letters of administration were acquired from a court without pecuniary jurisdiction and in respect to a property which the Plaintiff manages without his consent.

In rejoinder, the Defendants submitted that the Civil Suit No. MH 10 of 1989 did not divide the land as claimed to allocate 100 acres to the Plaintiff's mother, Late Eseza Ganukura. However, the interpretation of the judgments did not require a fresh suit. Instead, the Plaintiff should have sought the guidance of court under **Section 34(1) of the Civil Procedure Act** which mandates the executing court to address all questions arising without necessarily filing a separate suit. They submitted that the Plaintiff does not have locus standi to sue for the revocation of letters of administration in respect of the estate of the Late Enock Mukidi.

10 ISSUES

1. Whether the Civil Suit No. 005 of 2021 is Res Judicata?
2. What are the remedies available to the Parties?

ISSUE 1

Whether the Civil Suit No. 005 of 2021 is Res Judicata.

15 The Law on Objections

Order 6 rule 28 of the Civil Procedure Rules provides that any party shall be entitled to raise by his or her 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.

According to **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Limited [1969] EA 696**, it was held that a preliminary objection consists of an error on the face of the pleadings of a case which arises by clear implication out of pleadings and which if they are argued, would dismiss the suit.

One of the instances of a preliminary objection is a matter to which the principle of res judicata applies. The law in respect to res judicata is set out in **Section 7 of the Civil Procedure Act Cap 71** which provides that;

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

The Act provides explanations of the above provision and the relevant ones to this application are;

10 Explanation 1: a matter referred to under section 27 must have been alleged by one party and either denied or admitted, expressly or impliedly by the other.

Explanation 4: Any matter which might and ought to have been made a ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in that suit.

15 It is incumbent on Court to determine whether this matter falls under either of these explanations.

The rationale of Res Judicata was laid out in the of **Kyazike versus Nalujja (Civil Revision NO. 002 OF 2017) [2019] UGHCFD 52 (5 April 2019)** where the court held that the legal principle of res judicata 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
20 be a way of vexing individuals and abusing the court process.

In the case of **Law Development Centre versus Hon Mike Mabikke (Miscellaneous Application No. 0203 of 2021) [2023] UGHCCD 69 (31 March 2023)**, the court also held that the spirit of the doctrine of res judicata (is) succinctly expressed in the well-known maxim: ‘nemo debet bis vexari pro una et eada causa’ (no one should be vexed twice for the same cause). Justice requires that
25 every matter should be once fairly tried and having been tried once, all litigation about it should be concluded forever between the parties.

The Test of Res Judicata

The test for res judicata is laid out by various cases, some of which are as set out below;

According to the Court of Appeal of Uganda in **Ponsiano Semakula versus Susane Magala & Ors, 1993 KALR P.213** which was also cited with approval in the case of **Kafeero Sentongo vs Shell (U)**

5 **Limited and Uganda Petroleum Co. Ltd; CACA. No. 050/2003)** it was held 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’.*

10 Also, in another case namely **Lt. David Kabareebe versus Maj Prossy Nalweyiso; CACA No. 034 of 2003** 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”.

15 As was held in **Law Development Centre versus Hon Mabikke; (supra)** the plea of res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which properly belongs to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time”.

It follows, therefore, that the essential elements of the doctrine of res judicata are that;

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- a) There was a former suit between the same parties or their privies;
- b) The matter was heard and finally determined by the court on its merits;
- c) The matter was heard and determined by a court of competent jurisdiction; and

25 d) The fresh suit concerns the same subject as the previous suit.

(See: **Bithum Charles Versus Adoge Sally; HCCS No. 0020 of 2015** which relied on **Ganatra versus**

Ganatra [2007] 1 EA 76; Karia & Another v. Attorney General & Others [2005] 1 EA 83 at 93-994; and Attorney General & Anor vs. Charles Mark Kamoga MA 1018 of 2015).

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Resolution:

As has been stated prior, the determination of a preliminary objection is purely on the basis of point of law and is manifest on the face of the pleadings. It does not require one to devour into the substance of the matter being subjected to the preliminary objection but rather, only to the
10 extent of determining whether the same parties are back in court on the same subject matter that was already determined by another competent court of jurisdiction. On the criteria of determining elements for res judicata as set out above, the Court determines as follows.

It is true that the parties herein are the administrators of the estates of Late Enock Mukidi and Late Eseza Ganukura who were parties to Civil Suit No. MH 10 of 1989 that was in respect to a
15 declaration of ownership and trespass to land as has been set out above. The said matter was determined and even the appeal in respect to it was determined. By implication, a suit between the administrators of the same parties is a suit between them.

The question to be determined is whether the suit is in respect to the same subject matter. The former suit was in respect of trespass to land by the Lake Enock Mukidi as was being alleged by
20 Late Eseza Ganukura and it was determined. The current suit, though in respect to the same piece of land, is about the grant of the letters of administration to the estate of the Late Enock Mukiidi. The subject matter herein is the validity of the said letters and their grant on the basis of the will including the land which is said to belong to the Late Eseza Ganukura and the claim that the same were acquired from a court without jurisdiction.

25 This, in my view, raises new issues that were not the subject of the previous suit. The court herein is not being asked to determine the ownership of the 100 acres of land but rather, whether the letters of Administration of the Late Enock Ganukura are valid. Any explanations therein offered

ranging from the lack of locus standi to alleged fraud in the process of granting them is to be determined by court in a full hearing with the necessary evidence provided.

In the circumstances, it is my considered view once again that whereas this matter is related to the previous suit, it is distinctly different and raises questions that were not in contention in the first
5 suit. Such a matter must be determined by court in a full hearing.

Objection overruled.

Dated and delivered this 31st day of August 2023.

A handwritten signature in blue ink, appearing to read 'Isah Serunkuma', is written over a horizontal line. Below the signature, there is a faint, circular official stamp or seal.

10 **Isah Serunkuma**

JUDGE