

stage. Additionally, that the plaintiff acted as a guarantor on 22/7/2008 in the transaction in which his certificate of title was involved.

Further, that the plaintiff did not disclose to this court the fact that he knows how he relinquished the certificate of title to the 1st defendant. Also, that the plaintiff lied that he is not conversant with English when documents for his application for Letters of Administration for the estate of late Musoke Lubira Raphael are all set out in English without the need for certification that the record had been translated to him because he was not conversant with English. Counsel submitted that the plaintiff in effect is attempting to get this court to issue a decision which will conflict with the legal process in ***Mengo Chief Magistrate Court, Civil Suit No. 1401 of 2007***, and that the matter is *res judicata*.

Counsel went on to submit that the plaintiff has never served the 1st, 4th and 5th defendants whom he dealt with when handing over the purportedly disputed certificate of title. Counsel advanced the view that the plaintiff can recover his title in any other lawful manner, but should not be allowed to distort facts so as to cause this court to pass a decision that may be in conflict with another unchallenged decision of the Mengo Chief Magistrate's court.

In reply, Mr. Byamugisha Gabriel, Counsel for the plaintiff, submitted that the plaintiff's case is not *res judicata*; which is gist of the objections. Counsel submitted that the plaintiff was not a party to the case in the Mengo Chief Magistrate's court. Further, that the plaint, the decree, the application for execution, the warrant and the consent to settle execution proceedings duly signed by the Chief Magistrate on 9/04/ 2010 all do not mention the plaintiff, and that the 3rd defendant is not a party thereto.

Counsel also submitted that the suit in the Chief Magistrate's court was for recovery of Shs.12 million borrowed by the defendants in that case from the plaintiff and that the plaintiff successfully obtained an *ex parte* judgment against

them. That the pleadings in that case show that the loan was granted by the plaintiff (now 2nd defendant) to M/s. Elitek Technologies Int. Ltd. (1st defendant) and that the 4th and 5th defendants were the guarantors, and that the security for the loan was a house and a car – Toyota Corona. That judgment was entered against the defendants and execution issued against them.

Counsel also pointed out that during execution proceeding, consent was signed to settle execution proceedings and a Mitsubishi Pajero car was offered to partially secure the judgment debt, and that this consent was duly entered by the Chief Magistrate. Counsel argued that the subsequent consent which Counsel for the 2nd and 3rd defendants is trying to rely upon is neither filed in court nor signed by the trial magistrate, and that it does not even state the name of the magistrate, and hence not a reliable document. Counsel argued that it is only a draft, and is the only nexus between the plaintiff and the defendants.

Based on the above facts Counsel submitted that *res judicata* does not apply because the doctrine presupposes a case involving the same parties. For this proposition Counsel relied on **Section 7 of the Civil Procedure Act (Cap. 71)** and the case of ***Mansukhai Ramji Karia v. Attorney General & Others, Civil Appeal No. 20 of 2002.*** Counsel submitted that the 2nd and 3rd defendants would not succeed on *res judicata* because they have not proved that the plaintiff was a party in the former suit and that the same issue arose and the case was finally decided between the parties.

Furthermore, Counsel submitted that the suit in the magistrate's court was for recovery of the debt and the plaintiff was not a party or a guarantor. That the guarantors were clearly indicated on as Mukalazi Muwafu .B. and Ibrahim Kasule Kirumira, both of Kanyanya Lutunda Zone. Further, that the plaintiff is not party to the personal guarantee signed in the loan agreement and attached to the plaint in the magistrate's court, and that the 2nd and 3rd defendants unsuccessfully attempted

to smuggle the plaintiff on a belated consent purportedly signed on 22/7/2008 which in ordinary terms is a draft and did not name the magistrate and was never filed in court and was therefore never signed by the trial magistrate.

In addition, Counsel submitted that the case in the magistrate's court was distinctly different from the current suit in that the former suit was between the 2nd defendant as plaintiff and the 1st and 4th defendants were defendants, but that there is no mention of the plaintiff and the case is about recovery of Shs.12 million taken out as a loan whereby the 1st defendant was the borrower and the 4th defendant and another were guarantors. That judgment was entered against them *ex parte* and execution issued against the 4th defendant and the case was closed.

That in the current case the plaintiff is seeking to recover his land title he issued with a Power of Attorney and it was never returned to him, and that this was never an issue in the magistrate's court.

Resolution.

The doctrine of *res judicata* is encapsulated under ***Section 7 Civil Procedure Act (supra)*** which provides as follows:-

“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 such subsequent suit or the suit in which such issue has been subsequently raised, and has to be heard and finally decided by such court.”

Clearly, for a matter to be regarded *res judicata*, it must be directly and substantially in issue in the subsequent suit and must have been directly in issue in the former suit. See: ***Karsh v. Uganda Transport Co. [1967] E.A. 774***. The former suit must have been between the same parties or between parties under whom they

or any of them claim. See: *Gokaldas Laximidas Tanna v. Sister Rose Muyinza [1990 – 1991] KALR 21*. The court trying the former suit must have been a court competent to try the subsequent suit or suit in which such issue is subsequently raised. See: *Ismail Dabule v. Wildon Osuna Otwany (1992) I KALR 23*. Finally, the matter in issue in the subsequent suit must have been heard and fully decided in the first suit.

The test in the doctrine of *res judicata* is summarized in *Lt. David Kabareebe v. Maj. Prossy Nalweyiso. C.A Civ Appeal No. 34 of 2003*, where it was held as follows;

“To give effect to a plea of res judicata, the matter directly and subsequently in issue in the suit must have been heard and finally decided in the former suit. It simply means nothing more than that a person shall not be heard to say the same thing twice over in successive litigations.”

Applying the test to facts of the instant case, it is evident that the plaintiff was not a party to *Mengo Chief Magistrate’s Court, Civil Suit No. 1401 of 2007*. Not the same issue arose and the case was not finally decided as between the same parties. Even on the bare minimum of the requirements of the doctrine, the case fails the test of *res judicata*.

The second issue regards Counsel Mr. Muyanja’s submissions that the plaintiff filed the instant suit in abuse of court process. *Black’s Law Dictionary (9th Edition)* defines “abuse of process” as;

“The improper and tortuous use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process’s scope.”

Simply put, it means the use of a legal process against another primarily to accomplish a purpose for which it is not designed. A similar definition was adopted in *Attorney General & Uganda Land Commission v. James Mark Kamywa & Another, S.C.Civ. Appeal No.08 of 2004*, per Mulenga J.S.C. (R.I.P.). Also in

Kamurasi Charles v. Accord Properties Ltd. & Another, S.C.Civ. Appeal No. 03 of 1996, where two complaints had been instituted in the High Court by the same plaintiff against two different defendants in one suit and one additional defendant in the second suit involving the same subject matter at different stages, the Supreme Court concurred with the High Court that this amounted to abuse of court process.

Several instances were pointed out by Counsel for the 2nd and 3rd defendants, and the issue is whether they in fact amount to abuse of court process. The plaintiff in this case brought this action primarily because he is the Administrator of the estate of Raphael Rubira Musoke, and is registered on certificate of title for ***Kyadondo Block 131 Plot 42***. In paragraph 4(b) of the plaint, he avers that sometime in 2007, the 5th defendant misled him to surrender his title to him at no consideration, and promised to return it after a short time. In paragraph (c) thereof, the plaintiff avers that he has since demanded for the return of the certificate of title, but that the 5th defendant has failed or refused to bring it.

In paragraph (d) thereof, the plaintiff states that in 2010 he was contacted by the 3rd defendant alleging that the plaintiff's certificate of title is mortgaged to the 2nd defendant by the 1st defendant to obtain a loan, and that the 2nd and 3rd defendants intended to sell the property to realise the mortgage. The averments in the rest of the paragraphs are not quite relevant and need no mention.

By presenting facts as above, the plaintiff intends for this court to believe a number of things and to so act on them. The first one is that he was misled to surrender the title to the 5th defendant. This is, however, absolutely untrue for a number of reasons based on obvious facts. He does not demonstrate in his pleadings how he was misled by the 5th defendant. He does not sue in fraud or misrepresentation through which he would claim that he surrendered the certificate of title. The mere

assertion that he was misled is devoid of any particulars and remains absolutely unsupported

Further, it is on record that on 17/2/2007, the plaintiff obtained a document from his brother, one Semakula Emmanuel, a beneficiary to the estate of the late Musoke Lubira Raphael, authorizing him to mortgage the certificate of the title for **Block 131 Plot 42 land at Nakakololo**. Indeed on 28/2/2007 the plaintiff proceeded to endorse a mortgage deed as proprietor and surety securing the loan which was advanced to the 2nd defendant by the 1st defendant having granted the mortgagor Power of Attorney dated 13/02/2007 to mortgage the certificate of title. Furthermore, the plaintiff is aware that the 1st defendant defaulted on the loan leading to proceedings in **Civil Suit No. 1401 of 2007, Mengo Chief Magistrate's Court**. The suit was not defended and an *ex parte* judgment was entered on 17/3/2008. Execution process commenced, but on 22/7/2008, the plaintiff herein signed a consent agreement as a title holder for **Plot 42 Block 131**, as 1st guarantor to the 4th defendant herein, who was then a judgment debtor.

Even though the consent agreement is not signed by the magistrate, the fact that the plaintiff signed the document guaranteeing the 4th defendant's indebtedness clearly places him in the position of knowledge of the transaction. He cannot turn around and feign ignorance hiding behind the non - endorsement of the document by the magistrate, which would in any case have been the last step. The absence of the magistrate's signature or name would not in any way negate the fact that the plaintiff had signed the document guaranteeing the 4th defendant's indebtedness in the first place.

It is also evident that the plaintiff is very much aware of how the certificate of title came into possession of the 2nd and 3rd defendants. The plaintiff, as a matter of fact, gave consent for the title to be used as collateral. This is also evident from the mortgage deed which he endorsed and witnessed. It is the same transaction in

which the certificate of title was used as collateral by the 1st defendant to secure a loan from 2nd defendant. The plaintiff no doubt is well aware that execution process is on - going as regards the matter in magistrate's court. The arguments that the mortgage is illegal and that the certificate could not lawfully be used as collateral are merely technical arguments and do not negate the plaintiff's knowledge of how the certificate of title came into possession of the 2nd and 3rd defendants.

There is a point raised by the plaintiff that he executed the mortgage deed, but that it was in English which he is not conversant with. Counsel for the 2nd and 3rd defendants presented in court a petition by the plaintiff when he was applying for Letters of Administration for the estate of late Musoke Lubira Raphael, in ***High Court Administration Cause No.48 of 2004 at Nakawa***. The Declaration of the Petition for Probate and all documents thereto are duly endorsed by the plaintiff and are all set out in English, and there was no certification that the record was translated to him because he was not conversant with English.

Counsel for the plaintiff did not respond to this particular point. This court entirely agrees with Mr. Muyanja's submissions as the correct reflection of the position of the law. If it were granted that the plaintiff does not understand English, he would be categorized as an illiterate under the ***Protection of Illiterates Act (Cap.18)***. ***Section 1(b)*** thereof defines "illiterate" to mean, in relation to any document, a person who is unable to read and understand the script or language in which the document is written or printed. ***Section 2*** thereof provides for verification of signatures of illiterates, and ***Section 3*** thereof provides for certification by the person instructed so to write by the illiterate and that prior to the illiterate appending his or her mark, the document was read over and explained to the illiterate. Failure to comply with these requirements would render proceedings incompetent. See: ***Lotay v. Starlip Insurance Brokers Ltd. [2003] EA 551; Dawo & Others v. Nairobi City Council [2001] 1EA 69.***

The signature of the plaintiff was not verified, and there was no certification of the same in earlier court proceedings to show that he did not understand the language in which the documents were written or printed. He is therefore legally presumed to have understood the language, and is estopped by his conduct from claiming not to understand English in subsequent proceedings. The contrary would amount to shifting the standard when it best suits the plaintiff - a sharp practice which if employed to court proceedings as in this case is nothing short of abuse of court process.

For the plaintiff to have instituted the current suit against the defendants claiming the return of the certificate of title when he is acutely alive to the facts surrounding the certificate of title is plainly an abuse of court process. It is more so when he deliberately fails to disclose these facts and intentionally attempts to suppress them in order to recover the certificate of title which he well knows is a subject of on - going proceedings in another court.

The abuse of court process is more poignant by a critical analysis of the prayers/orders sought by the plaintiff. They include, *inter alia*, a declaration that the continued detention of the plaintiff's certificate of title is illegal, that the mortgage on the suit land is illegal, and an order cancelling the mortgage and returning the certificate of title to the plaintiff.

If this court were to grant the prayers and issue the orders, the net effect would be determining the subject of the on - going suit in ***Civil Suit No. 1401of 2007, Mengo Chief Magistrate's Court***. Equally, to declare that the so-called detention of the plaintiff's certificate of title is illegal when he actively participated in the process of handing it over to the defendants to be used as collateral would be gross abuse of process. Additionally, to declare that the mortgage is illegal just because the plaintiff's certificate of title is involved when he in fact donated Power of Attorney to the mortgagor to use the title and endorsed the mortgage deed, would

be a total abuse of court process as would be an order for cancellation of the mortgage. As it were, the plaintiff simply seeks to use the process of court to “eat his cake and have it.”

I find that the plaintiff abused the court process by filing this suit with a façade of violation of his rights, while at the same time hiding and suppressing material facts in order to obtain an illegitimate advantage through a court process. There is sufficient material to support the finding of abuse of court process. This court is enjoined under *Section 17 (2) Judicature Act and Section 98 CPA* to curtail such an abuse. Accordingly, the plaint is dismissed with costs. The defendants will proceed with their counterclaim.

BASHAIJA K. ANDREW

JUDGE

14/02/2014