

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
CIVIL SUIT NO. 151 OF 2004

VERSUS

20 BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

The plaintiffs brought this suit seeking orders of cancellation of the defendants from the registers for land comprised in Kibuga Block 17 Plot 19 land at Rubaga (*the “suit land”*) a declaration that the plaintiffs are entitled to be registered as proprietors of the suit land, *mesne profits*, accountability by the defendants for the rent/income/proceeds from the suit land, general damages, and costs.

1

transferred some portions of it to her own children at no consideration, and some other portions to other persons.

35 The plaintiffs as beneficiaries to the estate of their late father sued the 1st defendant with the other persons in Mengo Chief Magistrate's Court vide Civil Suit No. 149 of 1997. In the Chief Magistrate's Court the plaintiffs contended, among other things, that the 1st defendant mismanaged their late father's estate which included the suit land. In particular, the plaintiffs contended that the 1st defendant took away the property and gave it to her own children who
40 knew, or ought to have known, that she had no interest in the suit land. The plaintiffs sought orders of revocation of Letters of Administration granted to the 1st defendant, nullification of the transfer of land to the 1st defendant's children, and the accountability of proceeds from the estate. The 1st defendant and the others denied the allegations. Issues were framed issues for court's determination. The particular issues and how the Chief Magistrate's Court determined them is
45 the subject of the preliminary objection in the present suit and I will address them fully below.

Preliminary objection on point of law:

When the present case came up for hearing in this Court, Mr. John Kabandize, Counsel for the 2nd – 5th defendants, raised a preliminary objection that the plaintiffs' claim is *res judicata*; it having been fully and finally settled in a suit previous to the present suit under Mengo Chief
50 Magistrate's Court's Civil Suit No. 149 of 1997 ("*former suit*"). Counsel submitted that all the issues before this court for determination were tried and determined either directly and substantially in the previous suit. The issues for trial in the former suit were;

- (i) *Whether the defendant was the correct person to obtain Letters of Administration.*
- (ii) *Whether the defendants fraudulently managed the estate*
- 55 (iii) *Whether the plaintiffs action was time barred.*

(iv) *What remedies were available to the plaintiffs*

Counsel submitted that in resolving the issues of remedies in (iv) above in the former suit, the plaintiffs sought orders of revocation of Letters of Administration held by the 1st defendant, nullification of transfer to the 1st defendant's children, and the accountability of proceeds from
60 the estate.

Mr. Kabandize argued that the court in the former suit found that the 1st defendant was the correct person to obtain Letters of Administration. Further, that she acted fraudulently and/or mismanaged the estate. Also, that the suit was not time barred and that it was not possible to nullify the transfers to the 1st defendant's children since she had powers to sell part of the state.

65 Counsel also noted that the trial court ordered that Letters of Administration granted to the defendant be revoked and granted to the plaintiffs jointly, and that the 1st defendant accounts for the proceeds of the property she sold off and the whereabouts of the cows and household property of the deceased, and pays costs of the suit.

Citing section 7 of the Civil Procedure Act (Cap.71) (CPA) and a plethora of cases on the
70 doctrine *res judicata*, and the conditions and test applicable in the doctrine, Mr. Kabandize argued that given the facts of the case, the plaintiffs' claim in the present suit is barred by *res judicata*.

In reply Mr. Kwemala Kafuzi, Counsel for the plaintiffs was in agreement with facts to the extent they are also similarly reflected the judgment of the Mengo Chief Magistrate's Court. Mr.

75 Kafuzi submitted that what is, however, not stated in the judgment is the important fact that the 1st defendant got herself registered on the suit land of the plaintiffs' deceased father without Letters of Administration. That she was an administrator of the estate when she got registered on the land and she got registered fraudulently. Kafuzi argued that this point was not canvassed in

the Mengo Chief Magistrate's Court and nor was it captured in the judgment in the former suit.

80 That what the Court did not know, and which nobody brought to its attention, was the fact that the land they thought she was administering was actually not being administered, but that she had acquired it fraudulently into her own names and not as administrator but as personal property.

Regarding the prayer which had been sought in the former suit of nullification of transfer to the
85 1st defendant's children, Mr. Kafuzi submitted that the Court held that it was not possible under the law and that the only remedy was for the plaintiffs to force the 1st defendant to account. Mr. Kafuzi submitted that the Chief Magistrate's Court was under the mistaken impression that Plot 79 was part of the land being administered yet it was not. That if the Court ruled as it did at the time, it was under a mistaken impression and facts which emerged later showed that the 1st
90 defendant got registered on this land not as an administrator, and hence the cause of action against her in fraud still stands and the plaintiffs are properly before Court in the present suit, which is not barred by *res judicata*.

The issues for determination in respect of the preliminary objection are;

1. Whether the plaintiffs' present suit is *res judicata*.

95 **2. What are the remedies available to the parties?**

Resolution of issues

Issue No. 1: Whether the plaintiffs' suit is *res judicata*.

The law on the doctrine of *res judicata* was correctly restated by both Counsel in their respective submissions. Section 7 CPA which embeds the doctrine provides as follows;

100 ***"No court shall try any suit or issue in which the matters directly and subsequently 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 subsequently raised and has been heard and finally decided by the court.”

105 The conditions for the applicability of the doctrine of *res judicata* have been properly set out by courts in various decided cases. The critical cross – cutting requirements in the doctrine are that matters directly and substantially in issue in the subsequent suit must have been substantially in issue in a former suit. This position was amply expounded upon by the Court of Appeal in the case of ***Posiyano Semakula vs. Susan Namagala & Others, CACA No. 2 of 1977.*** Secondly,

110 the suit must be between the same parties or under whom they or any of them claims and the parties must have been litigating under the same title in the same suit. This position was also taken in the case of ***Gokaldas Lixilidas Tanna vs. Sister Rose Muyinza, HCCS No. 707 of 1987.*** Thirdly, the court trying the former suit must have been a court of competent jurisdiction to do so. See: ***John William Kahuka & Others vs. Personal Representative of Rt. Rev. Eric Sabiti***

115 ***(1995) V KALR 79.*** Fourthly, the matters directly and substantially in issue must have been heard and finally determined. This position was succinctly elaborated upon by the Court of Appeal in the case of ***Lt. David Kabareebe vs. Maj. Prosy Nalweyioso CACA No.34 of 2003.***

The test applicable in determining as to whether a case is barred by the doctrine of *res judicata* was stated in ***Ponsiyano Semakula Susan Magala & Others [1979] HCB 89*** quoted with

120 approval in ***Kafeero Sentongo vs. Shell (U) Ltd. & Uganda Petroleum Co. Ltd. CAC Appl. No. 50 of 2003,*** that;

“In determining whether or not the suit is barred by res judicata, the test is whether the plaintiff in the second suit is trying to bring before the court in another way in a form of a new cause of action, a transaction which he has already been presented before the

125 *court of competent jurisdiction in earlier proceedings which have been adjudicated upon.*”

In the case before hand the main issue is whether the matters directly and substantially in issue were directly and substantially in issue in a former suit, vide Civil Suit No. 149 of 1997 at Mengo Chief Magistrate’s Court.

130 The pleadings, particularly in the plaint, in the former suit show that the cause of action was founded in fraud. The plaintiffs therein averred that the 1st defendant got her names registered on the suit land through fraud. The specific issues framed for determination by the former Court were;

 (i) *Whether the defendant (1st defendant now) was the correct person to obtain letters of*
135 *administration;*

 (ii) *Whether the defendant (1st defendant now) fraudulently managed the estate.*

The Court in the former suit determined and pronounced on these issues and made the specific orders. At page 7 of its judgment, the Court in the former suit found that the 1st defendant was the correct and proper person to apply and obtain the Letters of Administration and was thus
140 entitled to be registered on the suit land as part of the estate. At page 7, in paragraph 3 (supra), the Court in the former suit held that although the 1st defendant was fraudulent in managing the estate, she had powers to sell the land and make transfers to her own children.

In the present suit, one of the issues which the plaintiffs seek to be determined by this Court, according to the joint scheduling memorandum, is ;

145 *“Whether the 1st defendant obtained registration over the suit land by fraud.”*

A cursory look at the plaint, at paragraph 4 (d), shows that the “suit land” referred to is described as “Block 17 Plot 79 at Nabunya”. The plaintiffs allege, under paragraph 5(a) of the plaint, that

the 1st defendant knowingly registered herself on this land, and then sub-divided it into plots which she transferred to herself and her own children leaving out the plaintiffs the actual
150 children of the deceased.

Clearly, the main issue in the former suit as in the present suit revolved around the fraud of the 1st defendant in dealing with the plaintiffs' late father's estate, which invariably included the suit land. This renders the matter directly and substantially in issue in the present suit related to the alleged fraud of the 1st defendant substantially in issue in a former suit. The Court in the former
155 suit finally and conclusively determined the issue. Since no appeal was preferred against the particular findings of the Court in the former suit, the same issue cannot be litigated and tried by this Court as they are *res judicata*.

This finding is fortified by the case of *John William Kihuku & O'rs vs. Personal Representatives of Rt. Rev. Eric Sabiti*, (supra) in which it was held that;

160 ***".....Since the issue of fraud had been in an earlier suit between the same parties and the same issue was litigated upon its merits and concluded in favour of the defendants where fraud was found not to have been proved, then the present suit was res judicata and not maintainable."***

I cannot but find that the above cited case squarely covers the situation on all fours in the instant
165 case. The Court in the former suit having found that the 1st defendant fraudulently dealt with the property of the estate of the plaintiffs' late father, which included the suit land, the issue cannot be tried and pronounced upon twice. The plaintiffs' remedy would, probably, reside in duly executing the decree in the former suit in Mengo Chief Magistrate's Court Civil Suit No. 149 of 1997.

170 Furthermore, it is in no doubt that the present suit is between the same parties or parties, “*under whom they or any of them claims and the parties are litigating under the same title in the same suit*”, as in the former suit. The plaintiffs in the present suit were plaintiffs in the former suit litigating as beneficiaries of the estate of their late father against one of the defendants who is the 1st defendant in the present suit. The Court that heard and determined the former suit was a Court
175 of competent jurisdiction to do so. Also to note is the fact that the matter of the 1st defendant’s fraudulent dealings in the estate of the plaintiffs’ late father in the former suit; which is directly and substantially in issue as in the present suit, was heard and finally determined. Therefore, there is nothing for this Court to determine.

Mr. Kafuzi advanced the view that the 1st defendant got herself registered on the suit land
180 without Letters of Administration, although she was an administrator of the plaintiffs’ late father’s estate when she got registered on his land. She therefore got registered fraudulently, and that this point was not canvassed in the former suit and nor was it captured in the Chief Magistrate’s Court’s judgment. Mr. Kafuzi argued that what the Court in the former suit did not know, and nobody brought to its attention, was that the land sought to be administered by the 1st
185 defendant was actually not being administered by her, but she had acquired it fraudulently into her own names and not as administrator but as personal property.

The careful perusal of the record of the Court in the former suit renders Mr. Kafuzi’s submissions in vain. It is quite clear that among the properties administered by the 1st defendant was Kibuga Block 17, Plot 79 land at Rubaga. This is reflected at page 1 of the judgment of the
190 Court in the former suit, and that fact has not been changed at all.

The other point reflected in the judgment in the former suit is that the 1st defendant went ahead to register herself on the suit land, subdivided it and distributed it to her own children. The

subdivisions are all being referred to in the pleadings in the present suit. They are as a result of sub diving Block 17, Plot 79. Those very plots were the ones given by the 1st defendant to her children who are defendants in the present case. That issue too was dealt with in the former suit. Accordingly, there is no new evidence that was not actually before the Court in the former suit that is in this Court. Even assuming that such evidence was not adduced in the former suit, the plaintiffs who ought to have adduced it still get caught up within the ambit of the doctrine of *res judicata*. The rule of *res judicata* requires that a party who ought to have taken a step and did not take it cannot be allowed to litigate on the same matter in a subsequent suit in another court. This principle was articulated in the case of ***Omondi vs. National Bank of Kenya Ltd, [2001] IEA 177*** where it was held that;

“The doctrine of res judicata would apply not only to situation where a specific matter between the persons litigating in the same capacity has previously been determined by a court of competent jurisdiction but also to situations where either matters which could have been enjoined were not enjoined. Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. They are bound to bring all their cases at once. They are forbidden from litigating in installments.....it cannot be otherwise, if the doctrine is to serve the two public policy objectives for which it was fashioned, namely, that it desirable that there be end to litigation and that a person should not be vexed twice in respect of the same matter.”

It is certain that by determining issues raised in the present suit, i.e.; whether the 1st defendant obtained registration on Kibuga Block 17 Plot 79 at Nabunya by fraud, and whether the rest of the defendants acquired a lawful interest in the land from the 1st defendant; this Court would be determining in another way the same issue that were determined in the former suit, i.e.; whether

the 1st defendant was fraudulent in obtaining Letters of Administration for the estate of the plaintiffs' late father.

A similar scenario presented itself in the case of *John William Kuhuku & Others vs. Personal Representatives of Rt. Rev. Eric Sabiti, HCCA 85 of 1989*. The cause of action both in former
220 suit and the suit before the court was based on fraud. It was held that since the issue of fraud had been litigated on in an earlier suit upon its merits and concluded in favour of the defendant, where fraud was found not to have been proved, the suit was *res judicata*. Issue No.1 is answered in the affirmative.

Issue No.2: What are the remedies available to the parties?

225 The position of the law as it stands is that where *res judicata* applies, the court has no choice but to dismiss the suit. The suit is accordingly dismissed with costs.

BASHAIJA K. ANDREW
JUDGE
31/01/2017

230

Ms. Doreen Ninsiima holding brief for Mr. John Kabandize Counsel for the 1st and 2nd defendants present.

Parties absent.

235 Mr. Godfrey Tumwikirize Court Clerk present.

Court: Ruling read in open Court.

BASHAIJA K. ANDREW
JUDGE
31/01/2017

240

