

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0019 OF 2013
(Arising from Arua Chief Magistrate’s Court Civil Suit No. 0063 of 2010)

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ONZIA ELIZABETH **APPELLANT**

VERSUS

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SHABAN FADUL (as Legal Representative of }
KHEMISA JUMA } **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

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In the court below, the appellant sued the respondent for trespass to land seeking a permanent injunction to guarantee her quiet enjoyment of the land in dispute, a declaration that she owns the land and an award costs with interest. Her case was that at all material time since the year 1981 she has been in physical possession of land situated at Tanganyika, Asuru Cell in Arua Municipality measuring approximately 25 metres by 100 meters by 30 meters. In the year 2000, without her consent, the respondent entered onto the land and began laying adverse claims to it, obstructing the appellant and carrying out unauthorised activities thereon, including cutting down her trees growing on the land.

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The respondent in her written statement of defence, the respondent stated that she owns the land in dispute through customary inheritance from her late father, the late Juma Draku. It is the appellant who during the year 2000 trespassed onto the land by planting trees thereon. She also pleaded *res judicata* stating that the subject matter of the suit had previously been decided by the L.C.III Court of Dadamu Sub-county which ordered the appellant to vacate the land in dispute save that the respondent was ordered to pay the appellant compensation for her trees on the land. The respondent rendered the amount ascertained through valuation but the appellant rejected it, insisting on a much higher figure.

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The question of *res judicata* was argued as a preliminary point of law. After listening to the submissions of counsel, the court ruled that the suit was *res judicata* and reserved only the issue of compensation.

- 5 Being dissatisfied with that decision the appellant challenges it on the following grounds, namely;-
1. The learned trial magistrate erred in both in law and fact when he held that the issue of trespass in civil suit No. 063 of 2010 was *res judicata*.
 - 10 2. The learned trial magistrate erred both in law and fact when he held that civil suit No. 063 of 2010 was *res judicata* when the L.III Court of Dadamu Sub-county was not a court of competent jurisdiction.
 - 15 3. The learned trial magistrate erred both in law and fact when he held that the parties in civil suit No. 063 of 2010 appear to have consented to the ownership of the suit land that it belonged to the respondent whereas the appellant is the owner of the suit land.

In his written submissions, counsel for the appellant Mr. Paul Manzi argued that the issue of
20 trespass was not tried by the L.C.III Court of Dadamu Sub-county since it was not competent to try the suit as a court of first instance considering that it has only appellate powers under the law. There is no evidence that the dispute went to that court as an appeal from the decision of any L.C.II Court. The judgment of that court cannot be construed as a consent judgment since it does not bear the signatures of the parties. He finally argued that the L.C.II Court was unconstitutional
25 in light of the decision in *Rubaramira Ruranga v. Electoral Commission and another, Constitutional Petition No. 21of 2006*. He prayed that the appeal be allowed with costs.

In his written submissions, counsel for the respondent Mr. Komakech Dennis Atiine argued that in deciding the case, the L.C.III Court of Dadamu Sub-county exercised its appellate powers and
30 did not try it as a court of first instance. It finally and effectively decided the issue of trespass and the Chief Magistrate's Court correctly decided that the matter was *res judicata*. Absence of the record of the lower courts could be explained by the informality in proceedings permitted by section 23 of *The Local Council Courts Act, 2006* and Regulation 24 of *The Local Council Regulations, 2007*.

The central issue in this appeal is whether the trial magistrate was right to dismiss the suit for being *res judicata*. According to section 7 of *The Civil Procedure Act*, section 38 of *The Local Council Courts Act, 2006* and section 210 of *The Magistrates Courts Act*, no court may 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 that court.

10 The Court of Appeal in *Ponsiano Semakula v. Susane Magala and others (1993) KALR 213* explained the doctrine of *res-judicata* as follows; -

15 The doctrine of *res-judicata*, embodied in s 7 of the *Civil Procedure Act*, is a fundamental doctrine of all courts that there must be an end of litigation. The spirit of the doctrine 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 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 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. If so, the plea of *res-judicata* applied 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".

20 When a question of fact or a question of law has been decided on its merits between two parties in a suit or proceeding and the decision is final either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. The minimum requirements under that provision were stated by the Supreme Court in *Karia and another v. Attorney General and others [2005] 1 EA 83* to be that; (a) there has to be a former suit or issue decided by a competent court (b) the matter in dispute in the former suit between the parties must also be directly or substantially in dispute between the parties in the suit where the doctrine is

pleaded as a bar and (c) the parties in the former suit should be the same parties or parties under whom they or any of them claim, litigating under the same title.

In *Boutique Shazim Limited v. Norattam Bhatia and another*, C.A. Civil Appeal No.36 of 2007, it
5 was held that essentially the test to be applied by court to determine the question of *res judicata*
is this: is the plaintiff in the second suit or subsequent action trying to bring before the court, in
another way and in the form of a new cause of action which he / she has already put before a
court of competent jurisdiction in earlier proceedings and which has been adjudicated upon? If
the answer is in the affirmative, the plea of *res judicata* applies not only to points upon which the
10 first court was actually required to adjudicate but to every point which belonged to the subject
matter of litigation and which the parties or their privies exercising reasonable diligence might
have brought forward at the time (See further *Greenhalgh v. Mallard* [1947] 2 ALL ER 255).

However, to give effect to the plea of *res judicata*, the matter directly and substantially in issue
15 must have been heard and finally disposed of in the former suit (see the case of *Lt David
Kabarebe v. Major Prossy Nalweyiso* C.A Civil Appeal No.34 of 2003). For the doctrine to apply
there must have been a decision on the merits of the case. Therefore, where the decision was not
made on the merits of the suit, the matter cannot be *res judicata* (see *Bukondo Yeremiya v. E.
Rwananenyere* [1978] HCB 96). Therefore in *Busulwa Isaac Bob v. Kakinda Ibrahim* [1979]
20 HCB 179, where the earlier suit had been dismissed on a preliminary point, such a dismissal was
found not to be a bar to a subsequent suit between the same parties on the same subject matter.
According to the decision in *Kerchand v. Jan Mohamed* (1919 – 21) EAPLR 64, where a suit is
dismissed on a preliminary point of law and the plaintiff did not have opportunity to be heard on
merits, a new suit on the same matter cannot be *res judicata*. Similarly in *Isaac Bob Busulwa v.
25 Ibrahim Kakinda* [1979] HCB 179, it was held that the dismissal of a suit on a preliminary point,
not based on the merits of the case, does not bar a subsequent suit on the same facts and issues
between the same parties.

The plea of *res judicata* is a question of mixed law and fact; it is founded on proof of certain
30 facts and then by applying the law to the facts so found. The basic method in deciding the
question of *res judicata* is first to determine the case of the parties as put forward in their

respective pleadings of the previous suit and then to find out as to what was decided by the judgment which is said to trigger the *res judicata* plea. The plea has to be substantiated by producing the copies of the pleadings and judgment in the previous suit. In some cases only a copy of the judgment in the previous suit is filed in proof of a plea of *res judicata* and if the judgment contains exhaustive or the requisite details of the material averments made in the pleadings and the issues which were taken at the previous trial, it may be sufficient proof.

Otherwise, since the plea is basically founded on the identity of the cause of action in the two suits, it is necessary for the defendant who raises the bar, to establish the cause of action in the previous suit and if claiming under parties to the previous suit, the relationship with such a party. In such a case the record will be supported with extrinsic evidence of the parties. The plea is decidedly dependent upon proof or disproof of many facts. It cannot be determined by mere speculation or inferences by a process of deduction what the facts stated in the previous pleadings were. It cannot be determined without ascertaining what the matters in issue in the previous suit were and what was heard and decided. Needless to say these cannot be established only by looking into the pleadings, the issues and the judgment in the previous suit. Unless the court has before it the relevant record of proceedings and has heard extrinsic evidence in relation thereto where necessary, it would be handicapped in coming to a proper decision on this issue.

To succeed in alleging *res judicata*, a party must show that (a) the matter in issue is identical in both suits, (b) that the parties in the suit are substantially the same, (c) there is a concurrence of jurisdiction of the court (d) that the subject matter is the same and finally, (e) that there is a final determination as far as the previous decision is concerned (see *DSV Silo v. The Owners of Sennar* [1985] 2 All ER 104). Undoubtedly the burden of proving *res judicata* was on the respondent. It is not a pure question of law which could be resolved on basis of the submissions of counsel alone. The court below was to determine the issue by consideration of the relevant record of proceedings and hearing extrinsic evidence in relation thereto.

When the Supreme Court in *Karia and another v. Attorney-General and others* [2005] 1 EA 83, had to decide on an issue as to whether *res judicata* may apply to a litigant in respect of a suit to which he was a party, it observed that the proper practice, is for the trial Court to try that issue

and receive some evidence to establish that the subject matter has been litigated upon between the same parties, or parties through whom they claim. In the instant case the Chief Magistrate's Court did not take any extrinsic evidence of the parties and neither did the court have before it copies of the pleadings and proceedings of the courts below. It relied entirely on a copy of the judgment of the L.C.III Court of Dadamu Sub-county and the submissions of counsel. I have had occasion to peruse the contents of the judgment relied upon. It does not set out what the parties pleaded in the previous suit and therefore it is not possible to determine the case of the parties as put forward in their respective pleadings of the previous suit before the matter came to the L.C.III Court of Dadamu Sub-county. It is not even disclosed what evidence was taken from either party in the previous suit, what the subject matter was and whether it was in respect of the same land now in dispute. In absence of an exhaustive exposition of requisite details of the material averments made in the pleadings and the issues which were taken at the previous trial, it was not possible to ascertain what the matters in issue in the previous suit were and what was heard and decided. The court ended up making its determination based on mere speculation or inferences by a process of deduction as to what the facts stated in the previous pleadings were. This was a most unsatisfactory way of deciding the issue of *res judicata*. Therefore ground one of the appeal succeeds.

On the other hand, Local Council Courts' jurisdiction over matters relating to land is conferred by section 10 (1) (e) of the *Local Council Courts Act, 2006*, whereby every local council court has jurisdiction for the trial and determination of land matters, subject to the provisions of the Act and of any other written law. According to section 10 (2) (b) of the Act, the jurisdiction of these courts in respect of causes and matters specified in the Third Schedule is not restricted by the monetary value of the subject matter in dispute. The Third Schedule of the Act lists civil disputes governed by customary law, triable by Local Council Courts and under item (a) of the schedule, jurisdiction is conferred over disputes in respect of land held under customary tenure.

The land in dispute being held under customary tenure, the dispute was triable by the Local Council Courts. However, section 11 of the *Local Council Courts Act, 2006* provides for the forum where suits are to be instituted, thus:-

“(1) Every suit shall be instituted in the first instance in a village local council court if that court has jurisdiction in the matter.....”

(c) in the case of a dispute over immovable property, where the property is situated

Section 32 of the same Act creates appellate jurisdiction and in respect of Parish Local Council
5 Courts provides as follows;

2) An appeal shall lie—

(b) from the judgment and orders of a parish local council court, to a town, division
or sub-county council court;

By that provision, L.C.III Courts have appellate jurisdiction only. It is trite law that the
10 jurisdiction of courts is a creature of statute. A court cannot exercise a jurisdiction that is not
conferred upon it by law. Therefore, whatever a court purports to do without jurisdiction is a
nullity *ab initio*. It is settled law that a judgment of a court without jurisdiction is a nullity and a
person affected by it is entitled to have it set aside *ex debito judiciali* (See *Karoli Mubiru and 21
Others v. Edmond Kayiwa [1979] HCB 212; Peter Mugoya v. James Gidudu and another [1991]
15 HCB 63*). Where a trial court has not exercised its original jurisdiction over a matter, there
certainly cannot arise a valid appeal on the merits. All subsequent appellate proceedings lack the
foundation and legitimacy of a preceding trial and cannot stand on their own. Therefore, in
absence of proof that the dispute went to the L.C.III Court of Dadamu Sub-county as an appeal
from the decision of an L.C.II Court, its decision would be on no consequence. Since the L.C.III
20 Court of Dadamu Sub-county lacked jurisdiction, there was no final pronouncement in existence
by a court of competent jurisdiction such as would have triggered the doctrine of *res judicata* as
a bar to a subsequent suit by any of the parties. Therefore ground two of the appeal succeeds.

With regard to the last ground of appeal, the nature of a consent judgment was explained by the
Supreme Court in *British American Tobacco (U) Limited v. Sedrack Mwijakubi, S.C. Civil
25 Appeal No. 1 of 2012*, to be a Judgment of the parties validated by Order 25 Rule 6 of *The Civil
Procedure Rules*. For that reason, in *Nshimye and Company Advocates v. Microcare Insurance
Limited and Insurance Regulatory Authority, H.C. Misc. Application No. 231 of 2014*, it was
decided that by consent judgments, the Court assists and facilitates parties to meet the ends of
Justice and that it would therefore be unfair and cause injustice to nullify a consent judgment
30 properly concluded. A consent judgment for that reason presupposes the existence of a legitimate

litigation that was pending before a court of competent jurisdiction at the time the parties agreed upon an out-of-court settlement. Having found that the proceedings before the L.C.III Court of Dadamu Sub-county were a nullity, no valid consent judgment can proceed from them. For that reason this ground succeeds as well.

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In the final result, I find the appeal has merit and it is accordingly allowed. The orders made by the trial court are hereby set aside. In their place is entered an order directing civil suit No. 0063 of 2010 to be re-instated and tried on its merits. The costs of this appeal shall abide the result of the re-trial.

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Dated at Arua this 15th day of June 2017.

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Stephen Mubiru
Judge
15th June 2017