

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
MISCELLANEOUS APPLICATION NO.1942 OF 2020
(ARISING FROM CIVIL SUIT NO. 808 OF 2019)

YAHAYA WALUSIMBI..... APPLICANT

VERSUS

1.JUSTINE NAKALANZI

2.LEVI LUYOMBYA

3.RUTH MUSISI

4.ROBINSON ABRAHAM KITENDA..... RESPONDENTS

(Sued as Administrators of the estate

The late Erisa Musoke)

Before: Hon. Lady Justice Olive Kazaarwe Mukwaya

RULING

This is a ruling on a preliminary objection raised by Counsel for the Defendants on the defence that this suit is res judicata under sections 7 and 8 of the Civil Procedure Act. Submissions were filed in support, against and in rejoinder of the application.

Background

The genesis of this matter dates back to High Court Civil Suit 119 of 1999. In that matter, Jackson Musoke Kikayira (deceased) successfully sued the Plaintiff, Mr. Yahaya Walusimbi and Rosemary Nalubega for the fraudulent subdivision and sale of

part of Kibuga Block 5 Plot No. 584 land at Kaleerwe Mulago. Being dissatisfied with that judgment, Mr. Yahaya Walusimbi and his co-defendant appealed to the Court of Appeal under Civil Appeal No. 40 of 2004 and that appeal was dismissed with costs. Mr. Yahaya Walusimbi then filed Miscellaneous Civil Application No. 386 of 2018 for
5 orders that the judgment in HCCS No.119 of 1999 and Civil Appeal No. 40 of 2004 be set aside on grounds of fresh discovery of fraud, which application was also dismissed by the Court of Appeal. The learned justices advised Counsel for the Plaintiff to seek redress from the High Court to entertain the fresh evidence of fraud in this matter.

By way of apparent response to the advice from the Court of Appeal, the Plaintiff filed
10 this suit in this Court for;

- i. A declaration that the judgment delivered on 5th May, 2003 in HCCS No.119 of 1999 in favour of the plaintiff therein for the beneficiaries of the estate of the late Erisa Musoke is null and void, having been based on fraud;
- ii. A declaration that the Plaintiff is a bona fide purchaser for land comprised in
15 Kibuga Block 85 Plot 1120 at Kalerwe;
- iii. An order setting aside the above judgment;
- iv. An order that the Commissioner Land Registration restores the suit land Kibuga Block 5 Plot 1120 in the Register and the original certificate of title in the names of the Plaintiff as proprietor;
- 20 v. Mesne profits; general damages and costs of the suit.

In the Written Statement of Defence, Counsel for the Defendant raised an objection that the matter is resjudicata and should thus be dismissed with costs against the Plaintiff.

25 Both counsel filed written submissions with authorities which I have closely studied and will consider in this ruling.

Issue.

Whether H.C.C.S. No. 808 of 2019 is barred by S.7 and 8 of the Civil Procedure Act on grounds of res judicata?

5 **RESOLUTION**

The defence of res-judicata is contained in section 7 of the Civil Procedure Act which provides as follows;

10 *“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 that Court.”*

For a claim of *res judicata* to succeed, the Defendant must prove that;

- 15 i. The same parties litigating in the former suit should be the same parties litigating in the latter suit or parties under whom they or any of them claim.
- ii. A final decision on the merits has been given in the former suit by a competent court.
- 20 iii. The suit or its subject matter must have been directly or substantially in issue in a former suit.
- iv. The parties should be litigating under the same title.
- v. The earlier suit must have been decided by a competent court and that court fully resolved the dispute.

25 I have perused the Complaint in this suit. There is only one question that was not handled by the High Court in Civil Suit 119 of 1999 and that is contained in paragraph 3(i) of the Complaint as follows;

A declaration that the judgment delivered on 5th May, 2003 in HCCS No.119 of 1999 in favour of the plaintiff therein for the beneficiaries of the estate of the late Erisa Musoke is null and void, having been based on fraud;

5 And

Paragraph 3(iii)

An order setting aside the above judgment

10 The prayer and claim in Paragraph 3(ii) of the Plaint, that the Plaintiff be declared a bona fide purchaser for value without notice is res judicata as the court in HCCS No. 119 of 1999 substantially dealt with the issue and ruled on the same. That decision remains intact since the appeal against it was dismissed.

15 When the Court of Appeal entertained the Plaintiff's application in Civil Application No. 386 of 2018, the learned justices of appeal while dismissing the application ruled thus;

'Since the appeal in this court was dismissed, effectively the High Court judgment remained intact. The applicant is at liberty to apply set aside the judgment and decree
20 *and re-hear the matter in respect of fresh evidence.'*

The Plaintiff by this suit is applying to have the judgment in HCCS 119 of 1999 set aside on grounds of fraud discovered in 2011. This issue of freshly discovered fraud is not res judicata since the Court of Appeal declined to substantially entertain Civil
25 Application No. 386/2018, which had the same subject matter, on its merits. However, the Plaint includes other issues which were determined by the court in HCCS 119 of 1999- the question of whether the Plaintiff was a bona fide purchaser for value without notice- which was fully handled by the trial judge in HCCS 119 of 1999.

As it stands now, the Plaint reveals claims that are partially res judicata and partially fresh evidence, which is ambiguous. It is incumbent that the Plaintiff present a fresh claim attributing the newly discovered fraud upon the Defendant as a fresh cause of action and a basis for this court to set aside the judgment in HCCS 119 of 1999. Res judicata is about the doctrine of conclusiveness of judgments as to the points decided, in every subsequent suit between the parties.

It was also premature for Counsel for the Defendant to delve into the merits of whether or not there was freshly discovered fraud, when the answer to that question would in effect dispose of the Plaintiff's intended claim against the Defendant. It was tantamount to adducing evidence in rebuttal from the bar.

In conclusion, the preliminary objection succeeds. The Plaint in Civil Suit No. 808 of 2019 is partially res judicata to H.C.C.S 119 of 199. The Plaintiff may take the necessary steps to avoid any hint of res judicata in any subsequent suit between the same parties before this court. This suit is dismissed with costs to the Defendant.

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Olive Kazaarwe Mukwaya

JUDGE

15th December 2020

Delivered by email to Counsel for both parties.

