

**THE REPUBLIC OF UGANDA**  
**IN THE 'HIGH COURT OF UGANDA AT KAMPALA**  
**LAND DIVISION**  
**MISCELLANEOUS APPLICATION NO.1349 OF 2021**  
**(ARISING FROM CIVIL SUIT NO. 1134 OF 2019)**  
**KASOZI JOEL SUSAN :::::::::::::::::::::::::::::::::::APPLICANT**  
*(Administrator of the Estate of the Late Nyanga George)*  
**VERSUS**

- 1. DICK LUTAAYA**
- 2. PAUL BUKENYA**
- 3. AUGUSTINE BUKENYA MUWULUZI**
- 4. NALUBEGA JUDITH**  
*(Administrators of the Estate of the Late Kironde Samwiri)*
- 5. COMMISSIONER FOR LAND REGISTRATION RESPONDENTS**

**RULING**

**BEFORE:      HON MR. JUSTICE HENRY 1. KAWESA**

The Applicant brought this application by notice of motion under Section 33 of the Judicature Act, Sections 7 and 98 of the Civil Procedure Act, Order 52 Rules 1 and 2 of the Civil Procedure Rules seeking for orders that:

- 1. That there is a decision of the Commissioner Land Registration dated 29<sup>th</sup> October 2019 to cancel land comprised in Busiro Block 536 Plots 477, 478, 481 and 482 and Busiro 535-540 Plots 182, 325 and 326 at Buwaya (formerly Block 536 Plots 141, 316, 149, 161, 162 vide MRV874 Folio 17) in respect of the subject matter in Civil Suit No. 1 134 of 2019, as such the suit is *res judicata*.*

2. That the subject matter in Civil Suit No. 1 134 of 2019 was long determined against Samwiri Kironde vide: Principal Court Civil Case No. 58/A/64 Martin G. Luyima for George Nyanga versus Samwiri Kironde.
3. That the Commissioner Land Registration be directed to vest the land comprised in Busiro Block 535-540 Plot 16 at Sazi, Namugala in the names of Kasozi Joel Susan, the Administrator of the estate of the Late Nyanga George.
4. Costs of the Applicant.

Only the 4<sup>th</sup> Respondent (Nalubega Judith) filed an affidavit in reply, despite all the Respondents having been served with the application. As such, Court shall proceed to determine the application in the absentia of the rest of the Respondents.

Counsel for the Applicant and the 4<sup>th</sup> Respondent filed written submissions, the details of which are on Court record. Court has appreciated the arguments of Counsel in the submissions and shall consider them where necessary.

Counsel for the Applicant raised three issues in his submissions for determination.

These are;

1. **Whether Civil Suit No. 1134 of 2019 is *res judicata***

2. Whether the disputed land in Civil Suit No. 1134 of 2019 is the very subject matter in the 1964

3. Whether the principal Court is Court of competent jurisdiction?

The Court has addressed itself to the law and principle of *res judicata*. Having done so, it takes issue of issue two as reproduced and the Applicant Counsel's arguments that flow from it. These arguments seem to suggest that whenever the property litigated upon in the new suit is the same as the one in a former suit, then the new suit is *res judicata*.

It is stated this way because Counsel for the Applicant argues that the subject matter, which he considers to be the suit land, in Civil Suit No. 1 134 of 2019 (Dick Lutaaya & Paul Bukenya versus Augustine Bukenya Muwuluzi & Others) (Administrators of the estate of the late Kironde Samwiri), and Commissioner Land Registration) is the same as the subject matter/suit land in Principal Court Civil Case No.58/A/64 (Martin G. Luyima for George Nyanga versus Samwiri Kironde). Court has strong reservations about this line of thinking, especially in view of the circumstances before it.

The Court has perused the plaint of Civil Suit No. 1 134 of 2019. Herein, the plaintiffs claim to be the registered proprietors of the suit land; and they claim to have acquired this from the beneficiaries of the Estate of the late Alicizanda Gabunga Ndiwalana (Cissy Nakazzi, Eseza Namirembe Nankya and Nampwere Erina). It is their claim that prior

the purchase of the suit land, they carried out due diligence and confirmed that the said persons were registered as proprietors of the suit land. One of the reliefs they seek against the defendants, among others, is a declaration that they were bonafide purchasers of the suit land for value and without notice of fraud.

On the other hand, Court has also perused the judgment in Principal Court Civil Case No.58/A/64. Court notes, first, that this was a decision of competent Court during the colonial era. Counsel for the 4<sup>th</sup> Respondent no doubt admitted this at page 5 paragraph 2 top, of his written submission; and thanks to our archival system that there is still documentation about the operation of that Court. In that regard, Counsel for the Applicant ably cited **The Buganda Courts Ordinance of 1940** which governed its jurisdiction, particular Sections 3 (3)(5), 11(1)(2)(3), and 15 of the same. Court wishes to say that this settles issue 3, as reproduced above.

In the said judgment, Court expressly found that land comprised in **Block 536 Plots 144,146, 149, 161, 162, land formerly known as MRV 874 Folio 17**, belongs to George Nyanga, whose estate is now represented by the Applicant. That judgment was given against Samwiri Kironde, whose estate is now represented by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents (the defendants in Civil Suit No. 1 134 of 2019). There is no doubt that the ownership of the said land is also in issue in Civil Suit No. 1 134 of 2019.

So as between the Applicant and 3<sup>rd</sup> and 4<sup>th</sup> Respondents, the decision of the Principal Court establishes that the suit land belongs to the late George Nyanga; and any subsequent litigation in respect of ownership of the suit land between Applicant and the 3<sup>rd</sup> and 4<sup>th</sup> Respondents in

their representative capacities, or any other person claiming in such capacities or under the estates they represent, would be res judicata. In reaching this conclusion, Court has referred to the case of **Akuku Ebifania versus Victoria Munia & Registered Trustees of Arua Diocese HCCA No.027 of 2016**, which was cited by Counsel for the Applicant, as regards the principle of res judicata.

Differently here, Civil Suit No. 1 134 of 2019 was brought by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents claiming ownership of the same land, in their individual capacities, as bonafide purchasers for value, and under a different estate.

So the sole issue for determination should be and is: Whether Civil Suit No.1134 of 2019 is *res judicata*?

In his entire submissions, the Applicant's Counsel asserts that Civil Suit No. 1 134 of 2019 is res judicata. Court observes that what consumes Counsel's mind to make such a conclusion is his unconsidered belief of the fact that the suit land that suit is the same as the one in Principal Court Civil Suit No.58/A/64.

Court notes that Section 7 of the Civil Procedure Act Cap 71 which the Applicant's Counsel ably cites as regards the subject of res judicata, talks of instances where "the matter directly and substantially in issue *" in the new suit was also "directly and substantially in issue in a former suit"*; and goes on state that the two suits (the former and new one) must be "between the same parties, or between parties under whom they or any of them claim, litigating under the same title" (Section 7 of the Civil Procedure Act Cap. 71). the implication of this is that, *res judicata* suffices not just when the property litigated upon is the same

in both suits. In addition to that, the right or interest claimed in that property (or thing) in the new suit must have been directly and substantially in issue in a former suit. For that to suffice, the new suit must be between the same parties as was the former suit or between parties claiming under them.

This subject is plainly put by Byamugisha J.A., in *Boutique Shazim Ltd versus Norattam Bhatia & Anor C.A.C.A No.36 of 2007*, and Mubiru J., in **Othonde Santino versus Opio Kerali HCCA No.0025 of 2014**, both cases cited by Counsel for the Respondent in his submissions. In the former case, Court observed 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 (reference made to what a new cause of action as per Motokov Case) 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 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 **Greenhalgh versus Mallard 119471 2 ALL ER 255**.*

In agreement with the alike proposition as reproduced above, Mubiru J. stated 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”.*

An illustration is appropriate in this regard. A subsequent litigation between A and B as regards a claim of right or interest in land C, or between D and E—if they so claim their right or interest in land C under A and B—is *res judicata* if there was a former litigation between A and B as regards the same right or interest in land C.

As already noted, the situation in Civil Suit No. 1134 of 2019 is far different. The plaintiffs therein claim a right in the suit land, but claim under a person who has neither been a party to any suit nor does that person's right or interest stem from any party from a previous suit. As such, plea of *res judicata* against Civil Suit No. 1 134 of 2019 cannot therefore suffice.

Before Court takes leave of the issue, it notes the concern by Counsel for the 4<sup>th</sup> Respondent that this application should not have arisen by virtue of the fact that the Applicant is not a party to Civil Suit No. 1 134 of 2019. That notwithstanding, it notes that the Applicant is not alien to the suit land and his application raised a point of law, and therefore an issue of legality of the suit given the dictates Section 7 of the Civil Procedure Act Cap. 71. It is trite that an illegality "once brought to the attention of Court overrides all questions of pleadings,

including any admission made thereon " (*Makula International Ltd Versus His Eminence Emmanuel Cardinal Nsubuga and Rev. Fr. Dr. Kyeyune, CACA No. 4 of 1981 or 1982 I-ICB 11*).

Accordingly, Court could not just close its gates and fail to entertain an application raising a matter of illegality on excuse of want of formality.

In the result, this Court finds the issue, of whether Civil Suit No. 1 134 of 2019 is *res judicata*, in the negative.

Having considered the merits and circumstances of the application, Court finds no merit in the application and as such, it is dismissed.

The costs of the application are awarded to the 4<sup>th</sup> Respondent, who alone defended the matter.

I so order

Delivered at Kampala this 31<sup>st</sup> day March of 2022.

.....  
Henry 1. Kaweesa

**JUDGE.**

31/3/2022



31/3/2022:

Ajungule for 3<sup>rd</sup> and 4<sup>th</sup> Respondents.

J. M. Mwaya FOR THE Applicant.

Both parties absent.

Sylvia – clerk.

Counsel for the Applicant:

It is for Ruling.

Court:

Ruling read to the parties above mentioned.

Sgd:

Ayo Miriam Okello

DEPUTY REGISTRAR

31/3/2022