THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO.591 OF 94

BETTY NALUMAGA NYAIKA::PLAINTIFF

V ERSUS

SERWANO KITYABA KULUBYA::.::::::::::::::::::;::::::::::::DEFENDANTS
FLORENCE KULUBYA

BEFORE: THE HONOURABLE JUSTICE I.MUKANZA

RULING:

At the commencement of The trial of this case, the learned defence counsel raised preliminary objection on the grounds that the plaintiff Betty Nalumaga has got no cause of action and therefore her action is misconceived and misplaced and should be dismissed with costs. He continued that Betty Nalumaga is suing in her capacity as an Administrator of the estate of her late daughter Margaret Nampiima deceased. Later letters of administration were granted to her under administration cause No. 306/94. Betty Nalumaga is claiming an interest in this estate of her daughter who claimed interest in the estate of her father Sam Kulubya the deceased. Margaret's claim was made in the High Court of Uganda and when the matter went to the Supreme Court Civil Appeal No. 15 of 1990 whereby Serwano Kulubya was the appellant and Margaret Nampiima the respondent, her claim was rejected and the court ruled that she had no interest in the estate of Kulubya particularly plot 15 situated on Nakivubo place/road commonly known as Kulubya place. It is apparent from the plaint and judgment of the Supreme Court the plaintiff is trying to resurrect the matter which was finally adjudicated upon by the Supreme Court.

The matter is now resjudicate and the effort to resurrect it will be an abuse of court process. He submitted that Betty Nalumaga had no locus standi to make a claim in the administration of the

estate of Sam Kulubya the deceased. She purports to hold letters of administration in respect of her daughter's estate whereas the claim by her late daughter in the estates of Sam Kulubya was dismissed by the Supreme Court. To maintain that there is a cause of action she must show that her rights had been violated by the defendant and in the circumstances since there are no rights enjoyed by her in the suit property her claim ought not to be maintained. The matter was resjudicate and was referred to the case of **Semakula .V. Magola 1979 HCB page 20** where it was held that the test is whether the plaintiff in the second suit is trying to bring before the court in another second way in the form of a new cause of action a transaction which has already been presented before a court which had competent jurisdiction in earlier proceedings and which has been adjudicated upon. If this is answered affirmatively the plea of resjudicate will then not only apply to all issues upon which the first court was called upon to adjudicate, but also every issue which properly belonged to the subject of litigation and which might have been raised at the time through the exercise of the due diligence of the parties. **Kamunye and others .V. The Pioneer General Assurance Society Ltd 1971 EA 26.** I do agree with the law with regard to the doctrine of resjudicate as explained in the referred to cases.

The learned counsel further submitted that the premises are known as Kulubya house situated on Plot 15 Nakivubo place which was completed by the Supreme Court. But was still being referred to her in the plaint particularly paragraph 4C. Nalumaga is going around to make a claim over a plot which was resolved by the Supreme Court. He further submitted that the plaintiff was a foreigner to the estate of the late Kulubya. She could not even question the management of the estate. The plaint should be struck out and the claim dismissed as being vexations frivolous and misplaced. She does not have the locus standi to question how the estate is being administered, questioning about the management of the estate of Kulubya is far fetched. Her daughter's claim was conclusively handled by the Supreme Court. They could not be dragged in that matter again. He prayed that the suit be dismissed under order 6 r. 26 of the Civil Procedure Rules.

Mr. Lubega counsel for the plaintiff submitted that there was a number of legal issues raised and would answer them in the order presented. The first being whether the plaint disclosed a cause of action. It is trite law that if the court is to enquire whether a plaint discloses a cause of action, it has only to look at the plaint. His learned friend has not presented to the court in which areas the

pleadings were lacking. The plaintiff had disclosed grounds why he was bringing the action. She was aggrieved by the fact that the property known as plot 15 Nakivubo Road, Kulubya house which was given to her daughter as a gift made intervivos has not been honoured by the defendant who are executors of the will of her father Sam Kulubya, that is clearly brought in paragraph 4 of the plaint which elaborates her areas of discontent and hence the cause of action. The remedies which the plaintiff is seeking from the court are quite clear and particularly a declaration as to ownership of that plot to No.15 Kulubya house.

The plaintiff's pleadings have clearly disclosed a cause of action and over which she is seeking the Honourable Court to determine her right.

On the second preliminary point that the plaintiff did not have the locus standi he submitted that the plaintiff had disclosed under para 4(c) of the plaint that she is the administrator of the estate of her daughter Margaret Nampiima and that was granted under Administion Cause No.306 of 1994 granted by the High Court. It is by virtue of this grant that the plaintiff has stepped in the shoes of her late daughter to pursue the gift that she had got from her late father called Sam Kulubya. Nampiima's rights have not abated. They are very much still alive and the plaintiff was clothed with the necessary grant to pursue them. She has to pursue on behalf of the gift made to her intervivos by her late father.

On the third point raised by his learned friend was the doctrine of resjudicate. He looked at the plaint filed in respect of this matter which went on appeal to the Supreme Court. The matter came to court under Misc. case No. 41/9 whereby the defendants in the case were the applicants and the late Nampiima Margaret was the respondent. That case was brought by the applicants to show cause why a caveat she had lodged on the suit property plot 15 should not be removed. The main issue for the court to determine was whether the letter under which Nampiima's father late Kulubya had given property to her was a codicil or not. The Hon. Judge decided the matter in her favour and decreed the property to her. On appeal Civil Appeal No. 15/90, the Hon. Judge's judgment was on the basis that the letter bequeathing the property to her was not a codicil.

The Supreme Court did not go into the issue of the ownership because right from the High Court that matter had not been presented to the court for determination. The learned Judge declined to

deal with the matter. The question then before the court is whether the matter concerning plot No. 15 is resjudicate or not. He submitted further that he had the opportunity to peruse Semakula's case above. The test that was used in that case to determine the doctrine of resjudicate in his view was the proper test. He invited court to look at the pleadings. The plaintiff is not going around to resurrect a matter that has been clearly closed.

In the former case which went to the Supreme Court the issue for determination was whether the caveat was to be vacated or not and nothing more. The question of whether the plaintiff is entitled now as Administrator to the estate plot No. 15 Nakivubo Road was never tackled. So the court has the jurisdiction to enquire in it. I was referred to the case of **Karsani .V. Bhogal 1953 20 EACA P.74** where the court held that matter in issue does not mean any matter in issue but the entire subject in controversy. He submitted that the Supreme Court was called upon to determine only one issue the caveat. The controversy surrounding the ownership of the property had not been resolved.

This Hon. Court is being called upon to decide whether gift intervivos supersedes an earlier view and whether this gift intervivos is valid or not, and whether it is testamentary disposition or not. The learned counsel invited this court to hold that the doctrine of resjudicate is not applicable and at the same time, the institution of this case is not an abuse of court process.

As to whether the case was frivolous and vexations he submitted that his learned friend failed to prove in which areas the plaint is frivolous or vexatious. The plaintiff has as the Administrator of Margaret Nampiima to call upon the Administrator to the estate of her late father to render an account to how they have administered the estate. He prayed that the court ignores the preliminary point of law and set the suit for proper hearing and he also prayed that Misc. Cause No. 41/89 be availed to the court for perusal.

In reply Mr. Winyi counsel appearing for the defendant submitted that counsel had misled the court that the matter settled in the Supreme Court was a question of caveat only. The Supreme Court was to determine whether or not a letter written by Kulubya not witnessed amounted to codicil. From the record here and in the Supreme Court that Sam Kulubya died testate and in his will did not name Nampiima as her daughter and not even bequeathed any property to her.

Nampiima came to court with a letter alleging came from Kulubya. The High Court ruled that the letter amounted to a codicil and that she was entitled to plot No. 15 Kulubya House but when the matter sent to the Supreme Court the judgment was rejected and the court found that the letter was not a codicil with the view that she was ordered to remove a caveat she had lodged. Now the matter is being re-dragged to court which is not proper and this is resjudicate. Nalumaga cannot come around and claim through her daughter which claim was dismissed by the Supreme Court.

He finally submitted as pointed out in the Karsan's case by his learned friend that the entire controversy must be dealt with and this hinges on the letter which was never in the will of the late Kulubya. The ruling was on caveat.
It is not correct to say that the court would be called upon to decide whether the codicil supersedes the earlier will, the doctrine of resjudicate is relevant here and prayed that the preliminary objection be upheld.

I had the occasion to peruse the records of this court in Misc. Appl. No. 41/89 and of course the plaint in this case. I also considered the forceful submissions of the learned counsels. The issues upon which decisions are being sought are three. One, whether the plaint discloses a cause of action and the second issue is whether the plaintiff had the locus standi in this case and finally whether the matter is resjudicate. I will deal with the issues in their numerical order as outlined above.

As to whether the plaint discloses a cause of action. Order 7 rule 11 (a) provides that a plaint shall be rejected in the following cases:-
(a) whether it does not disclose a cause of action.
(b)….
(c)…
(d)…
(e)…

In the case of **Sempa Mbabali .vs. Kiaza and 4 others (1985) HCB 46 at p.47,** In holding 2, it was held that a plaint discloses a cause if it shows that the plaintiff enjoyed a right and that the right has been violated and that the defendant is liable. The same principle was disclosed in the

case of **Hassan vs. National Bank of India 1932 EA EACA page 55**, where Mustaff (Judge) held that there are three essential elements to support a cause of action that the plaintiff enjoyed a right and the right has been violated and the defendant is liable.

In another case **Amin Electrical Service .vs. Ashon Theator Ltd 1960 EA P.298** there the plaintiff sued for the value of the_materials used and charges for labour in respect of certain installation at a cinema. The plaint contained no averment that the labour charges were agreed or were reasonable or that the prices of materials, were agreed or were reasonable. The defendant took preliminary point that the plaint disclosed no cause of action since it did not contain particulars of facts constituting the cause of action or where it arose. It was held that the failure to allege that labour charges were agreed or were reasonable or that the materials supplied were at agreed or reasonable prices was defect in pleading which however did not go the cause of action and was curable by amendment
Lake Motors .vs. Overseas Motors Transport (T) Limited 1959 EA 603 was adopted.

It was contended by Mr. Winyi that the plaintiff had no cause to show that she had a cause of action. She must show that her rights have been violated because the matter is resjudicate. I am of the view and in this respect I agree with Mr. Lubega that in order to determine whether the plaint discloses a cause of action we have to look at the plaint itself.

According to paragraph 4 of the plaint, the plaintiff is the holder of letters of administration under Administration Cause No, 306/94 in respect of the late Margaret Nampiima who died intestate.

The plaint further showed that the late Margaret Nampiima was the first born daughter and child of the late Sam M. Kulubya who is also deceased. That the late Samuel Kulubya left a will appointing his mother, his father plus the two defendants as the executors of the will. It is further shown in the will that the late Samuel Kulubya left various portions of land which included plot 15 Nakivubo Road. It is alleged that the said gift intervivos given to the late Nampiima Margaret but it was alleged that the defendants had chosen to ignore the grant and hence this suit. I am of the view that the plaint disclosed a cause of action whether plot 15 Kulubya place was a gift intervivos given to the late Nampiima Margaret and the plaintiff who was granted letters of

administration was in the shoes of her daughter and could bring the action against the defendant. She had that right which was violated by the defendants and they were liable. And even if there were defects in the plaint which is not the case here, the same could be cured by amendment, am still satisfied that the plaintiff had the locus standi to bring this action.

As to whether the matter was resjudicate Section 7 of the Civil Procedure Act provides;

“No court shall try any suit or issue in which the matter directly and substantially has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of their claims, 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 been heard and finally decided by such court.”

The defence of resjudicate cannot be raised unless it is specially pleaded in the defence. The cause of action must be brought against the same defendants or against persons jointly liable on the same cause of action. See **Jerrao .V. Neol 1885 156 BD 54, order1923 2KB p.432. Bdevait Cokes 1889 43 ch D page 187 Isaac and Sons vs. Salbastein 1916 2 KB 139. See also Oders Principles of pleadings and practice 19th Edition page 197.**

In the instant case, the plaintiff is Betty Nalumaga Nyaika whereas the defendants were Serwano Kulubya Kityaba and one_Florence Kulubya. Th parties in the Supreme Court Were Serwano Kulubya and Florence Kulubya whereas the respondent was Margaret Nampiima, Betty Nalumaga is administrator to the estate of the late Nampiima came into the shoes of the latter and as I said earlier she had the locus standi. The cause of action in the Supreme Court was Plot No.15 Nakivubo in which the said Supreme Court ordered that the caveat lodged with the same be removed. In the present plaint, the plaintiff’s claim against the defendants jointly and severally is for the revocation of probate granted to the defendants the defendants to file an action of how they managed the estate of the late Samuel Kulubya, a declaration of the properties which form part of the estate of the late Samuel Kulubya, General and special damages from which transpired above. The cause of action is not the same.

However, under paragraph 4(c) of the plaint, it is mentioned that the late S.M. Kulubya before his death made an ought right gift plot No. 15 Nakivubo Road and the house therein was given to the late Margaret Nampiima and this was duly communicated to the first and second defendants. So even if I may be wrong in that the cause of action was different but the question of ownership of plot 15 Nakivubo was never finally adjudicated upon. I am fortified in this when the learned Justice of Appeal had this to say:

> *"In my view, the trial Judge should not have considered the point since the whole issue before her was whether the respondents' caveat should be removed. It is also clear that the first plaintiff intended to challenge the letter of 25.5.82 with the ground that it had been extracted from the lost order by unfair means and so it would have been necessary to hear the parties on the question of ownership."*

From the explanation above the matters complained of in the plaint was not finally adjudicated upon by the Supreme Court and obviously the cause of action were not the same both actions were not brought against the same defendant on the same cause of action. In the end the doctrine of resjudicate is not applicable in the circumstances.

The preliminary objection raised by the learned counsel appearing for the defendants is therefore overruled with costs to the plaintiffs.

I. MUKANZA
JUDGE
31.1.1995