THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT GULU

MISCELLANEOUS APPLICATION NO. 166 OF 2023

ARISING FROM CIVIL SUIT NO. 057 OF 2022

MUNDRUGO RICHARD::APPLICANT

VERSUS

1. **ALUM SANTA**
2. **OLOYA RICHARD UMARI:::RESPONDENTS**

BEFORE: HON. MR. JUSTICE GEORGE OKELLO

RULING

Introduction

By the present Application commenced by Summons in Chambers, the Applicant who is Defendant in Civil Suit No.057 of 2022, seeks for a strike out and dismissal orders to issue on the plaint and thus civil suit No. 057 of 2022 lodged by the Respondents, on the ground of *res judicata.* He prays for costs. The Application is premised on Order 7 rules 11 and 19, and Order 6 rules 29, 30 and 31 of the Civil Procedure Rules SI-71-1 (CPR). The Applicant swore an affidavit in support. The Respondents oppose it by their replying affidavits.

A brief background facts should suffice. The Respondents and three others, have lodged Civil Suit No.057 of 2022 against the Applicant. The three co-plaintiffs are Aromorach Winifred (suing as beneficiary of the estate of the late Labeja

James); Ayeli Abdu, and Opiyo Nelson. Their dispute relates to land. The Plaintiffs want court to declare that they were unlawfully evicted from a piece of land measuring approximately 1 and ½ plots. It is located in Pabbo Quarters, Gulu West Division, Gulu City. They also seek to be declared owners. The Plaintiffs further seek compensation for alleged destruction of their property, general and punitive damages, interest and costs. In the suit, the present Respondents aver they acquired their respective portions of land from a one Angee Doreen in the year 2000 and 2001, respectively. In his defence, the Applicant aver, inter alia, that, the Respondents have no legitimate claim to the suit land since they acquired their interests from a person whose transactions on the suit land have been nullified by a decree of a Magistrate Grade 1 in Civil Suit No.001 of 2013 which a one Mr. Mundugo Richard lodged against Ms. Angee.

It is on the basis of the above averments, among others, that the *res judicata* plea is being raised. The Respondents were put on notice in the Applicant's Written Statement of Defence that the objection would be raised, hence the Chamber Summons.

Representation.

At the hearing, learned counsel Mr. Aciga Richard and Mr. Odit Emmanuel appeared for the Applicant while learned counsel Mr. Komakech Stephen

represented the Respondents. Counsel filed written submissions which I have read.

Issue for resolution

The sole issue is *whether Civil Suit No. 057 of 2022 is barred by the doctrine of res judicata as regards the Respondents only?*

Resolution

Exercising his right under Order 6 Rule 28 of the CPR, the Applicant has raised the point of law both in the Written Statement of Defence and the Chamber Summons. It is now court's duty to decide whether or not to dispose of the point of law now or after hearing the head suit. My conclusion of course will depend on the analysis and findings which I shall dive into shortly.

I have noted that the provision of Order 6 rule 30 of the CPR has been invoked erroneously because this matter is not concerned with non-disclosure of reasonable cause of action, or frivolity or vexatiousness of the head suit. Similarly, rule 31 of Order 6 CPR is inapplicable because it concerns the procedure for moving court by Chamber Summons where court is being asked to amend pleadings or strike out matters in any endorsement or pleading which is scandalous or unnecessary or may prejudice, embarrass or delay fair trial, as per rules 18, 19 and 22 of Order 6. Thus the only remainder rules which are relevant aside from Order 6 rule 29 CPR, are Order 7 rule 11 (d) and 19 of the CPR which allows for rejection of a suit where, from the statement of the plaint, it is barred by law. Whereas in practice the rule is commonly invoked where the

suit is time-barred, I think suits which are statute-barred such as by section 7 of the CPA (res judicata), can properly be taken care of within the purview of Order 7 rule 11 (d) of the CPR. Thus the plea of res judicata is one such points of law that is capable of disposing of the whole suit, if upheld.

By the present application, the Applicant wishes court to dispose of the suit as presented by the Respondents only. He has no qualms against the action by the other co-plaintiffs against him, in as far as the point of law is concerned.

The doctrine of res judicata is set out in section 7 of the Civil Procedure Act. The section provides,

"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 the court." (Underlining is for emphasis.)

To start with, *Res judicata* means a matter adjudicated upon or a matter upon which judgment has been pronounced. The matter must have been alleged by one party and either denied or admitted, expressly or impliedly, by the other. Section 7 of the Civil Procedure Act contains the rule of the conclusiveness of the judgment. It is based on the maxim of the Roman jurisprudence *'interest reipublicae ut sit finis litium'* (it concerns the state that there be an end to law suits) and, partly on the maxim *'Nemo debet bis vexari pro una at eadem causa'* (no man should be vexed twice over for the same cause.) Thus, put differently, every suit must be sustained by a cause of action and there is no

cause of action to sustain the second suit since it is being merged in the judgment of the first. See: ***King Vs. Hoare (1844) 13 M&W 494, at 504***; ***Kendall Vs. Hamilton (1879) LR 4 AC 504, at 526***. The rule of *Res judicata* is based on public policy which requires that there should be an end to litigation. See: ***Ponsaino Semakula Vs. Susane Magala & others (1993) KALR 213.*** Thus the question whether the first decision is correct or erroneous has no bearing on the question whether it operates or does not operate as res judicata. See: ***Tarini Charan Vs. Kedar Nath (1928) 33 CWN 126, AIR Cal 777 (FB); Mohanlal Vs. Benoy Krishna 1953 SCR 377***. The immediately the foregoing principle appears to be supported by explanation number 2 to section 7 of the CPA. The rationale of the foregoing is that, every erroneous decision would be litigated again to get another opinion, and there would be no finality: See: ***Behari Vs. Majid (1901) I LR 24 All 138***.

Res judicata is not a pure question of law, but a mixed question of fact and law. It has to be specifically pleaded and the person relying on it should place before court, all material particulars which would be sufficient to give a finding whether the particular case is barred by *res judicata*. See: ***Krishna Chand Nayak Vs. Neela Kanthi Mohanti, AIR 1996 ori 1.***

Once successful, the plea of res judicata prohibits the court from entering into an inquiry at all, as to a matter already adjudicated upon. In other words, res judicata prohibits an inquiry in *limine*. Thus, an issue of fact may be res judicata, but, this is not so where in the subsequent suit, altered circumstances are pleaded. See: ***Mangharan Chuharmel Vs. BC Patel (1972) I LR Born 30.***

Finally on res judicata, it is the competency of the trial court which determined the 'former' 'suit' that must be looked to, and not that of the appellate court in which that

suit was ultimately decided on appeal, or of executing court. See: ***Toponidhee Vs. Sreeputty (1880) I LR 5 Cal 832***; ***Bharasi Vs. Sarat Chunder (1896) I LR 23 Cal 415; Official Asignee of Madras Vs. Aiyu Dikshithar (1925) 48 Mad LJ 530***.

The above views were equally expressed by this court in the case of ***Mario Ali Vs. Opoka Santo, Misc. Application No. 14 of 2022.***

Therefore, for a matter to be held to be res judicata, the following conditions ought to be satisfied;

i) The matter must be directly and substantially in issue in the two suits.

ii) The parties must be the same or the parties under whom any of them claim (representatives/ privies), litigating under the same title.

iii) Court must have been competent.

iv) The matter must have been previously and finally decided in the earlier suit.

For the above principles, see: ***Ganatra Vs. Ganatra [2007] 1 EA 76, at 82***; ***Betty Akech Okullo & 2 Others Vs. Okema James & 4 Others, High Court Civil Appeal No. 28 of 2020***.

At the risk of being monotonous but for emphasis, in ***Ponsaino Semakula Vs. Susane Magala & others (1993) KALR 213*** *(supra)*, it was stated among others that, 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 is whether the plaintiff in the second suit is trying to bring before the court in another way and in the form of a new cause of action, a transaction which he/she has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If the answer to the foregoing

question is yes, then the plea of res judicata should apply 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. See also: ***Kamunye & others Vs. the Pioneer General Assurance Society Ltd (1971) EA 263; Godfrey Magezi Vs. National Medical Stores & 2 others, HCCS No. 636 of 2016***; ***Boutique Shazim Ltd Vs. Norattam Bhatia & another, Civil Appeal No. 36 of 2007 (COA).***

The doctrine of Res Judicata therefore applies where there is an existing final judgment rendered upon the merits, without fraud or collusion, by a court, tribunal, or other judicial body, of competent jurisdiction. It is conclusive of causes of action and of facts or issues thereby litigated as regards the parties and their privies. Once a decision has been given by a court of competent jurisdiction between two persons or their privies over the same subject matter, neither party would be allowed to relitigate the issue again or to deny that the decision had in fact been given, subject of course to certain conditions which I need not go into. So a litigant cannot be allowed to go forever re-litigating the same issue with the same opponent before courts of competent jurisdiction by giving his case some cosmetic facelift.

The burden of proving res judicata is on the person raising the plea. See: ***Onzia Elizabeth Vs. Shaban Fadul (as legal representative of Khemisa Juma), Civil Appeal No. 0019 of 2013 (per Stephen Mubiru, J.)***

Turning to the facts, the Applicant attaches the decree issued in Civil Suit No.001 of 2013. That was a suit lodged by a one Mundugo Richard against Angee Doreen. There was no counterclaim. Simply stated, Ms. Angee did not sue **Mundugo** Richard. In it, the Plaintiff sought a declaration that he lawfully owns approximately **4 (four) plots** of land at Pabbo Quarter Sub-Ward, Layibi Division, Gulu Municipality, among other reliefs. There is no record of the proceedings. There is no copy of the judgment either. What is adduced before me is a Decree of His Worship Owino Paul Abdonson, issued on 07th December, 2016. Therein, the plaintiff got the declaration sought. Vacant possession was equally ordered. All transactions entered into by Ms. Angee respecting the suit land, as an owner, were declared null and void.

In the present head suit no. 57 of 2022, the Plaintiffs are Alum Santa, Aromorach Winifred, Ayeli Abdu, Oloya Richard Umari, and Opiyo Nelson suing **Mundrugo** Richard (not Mundugo). The Plaintiffs are challenging the alleged unlawful eviction from land at Pabbo Quarters, Gulu West Division, Gulu City, measuring **1 ½ plots**, among other reliefs. Regarding the present Respondents who are the 1st and 4th Plaintiffs in the headsuit, they aver that they acquired their respective portions from Angee Doreen in the year 2000, and 2001, respectively. They also contend that, in the year 2017, while purporting to act under a court order, the Defendant (the present Applicant) evicted the Plaintiffs from their distinct pieces of land and demolished their buildings. After the demolition, the Plaintiffs (Respondents) repossessed their properties and reconstructed houses. They were

then served with notice of intended suit dated 7th May, 2022 by the Defendant (Applicant). The Plaintiffs aver they were not parties to the earlier suit and cannot be affected by the decree therein. They contend, they obtained their plots before the suit of 2013 was lodged, and ought to have been added as Defendants in that suit. They further contend, the acts of the present Applicant was wanton, oppressive and unconstitutional.

Learned counsel for the Applicant argued that his client litigated over the same land in the earlier suit against a person from whom the Respondents claim interests. Counsel concludes, it is the same land at issue in the present head suit which Ms. Angee lost, so, since the Respondents claim through her, they are so bound by the decree. Learned counsel relies on the sweeping orders of the learned Magistrate Grade 1, nullifying *"all transactions"* executed by Ms. Angee, to buttress his point. Counsel for the Respondents does not agree. He submitted that the subject matter of the two suits are different. In the earlier case, it was 4 (four) plots while in the instant head suit, it is 1 and half plots, learned counsel asserted. Counsel further contended, whereas the pieces of land at issue in this and earlier suit are in the same location, there is nothing to show that it is one and the same piece of land. Learned Counsel for the Respondents also contended that the parties in the two suits differ. He posed the question of whether Angee Doreen and the Respondents were litigating under the same title. Counsel then argued, having purchased separate portions from Ms. Angee, the Respondents acquired distinct interests in their respective portions and obtained title separate

from Ms. Angee. On the other hand, counsel for the Applicant contended that, since the Respondents argue that they were not parties to the earlier suit in which the court nullified all transactions by Ms. Angee, the Respondents should have instead sought review of the decree under section 82 of the CPA and O.46 of the CPR instead of lodging the present head suit.

In resolving the rival contentions, my opinion is that the Applicant has failed to prove his plea. The Applicant's failure to attach, first of all, the pleadings in the earlier suit, is indicative of total failure. I note that it was the Respondents who adduced in their replying affidavit, the plaint filed by Mundugo Richard in the earlier suit. Be that as it may, the Written Statement of Defence of Angee Doreen, if any, has not been availed by the Applicant. The record of the proceedings and the Judgment of the court have not been produced by the Applicant either. The Applicant has only conveniently annexed the court Decree, thus depriving this court of the basis of that decree which can only be ascertained from the record of the proceedings and the Judgment. I have further noted that, from the plaint in both suits, the description of the land is not uniform. In the earlier suit, it was 4 (four) plots while in the present head suit it is 1 and half plots. It is thus not clear whether the Applicant's suit against Ms. Angee pleading 'approximately 4 plots', by any stretch, enveloped the 1½ plots claimed by the present Respondents and their co-plaintiffs. These matters would require the record of the trial court to enable this court gauge what evidence was adduced regarding the Applicant's land claim. Consequently, it is not known whether the

Respondents were evicted from the land which was litigated and decreed to the Applicant or whether the Applicant went beyond the area decreed.

Furthermore, the issue canvassed in the earlier suit is not readily clear as this court has not been afforded the relevant material for perusal, to be able to form an opinion. Thus, the issues that will likely be central in the present head suit, *prima facie,* touch on whether the execution of the Decree in Civil Suit No. 1 of 2013 was unlawful or proper. That issue was certainly not at issue in the earlier suit. Of course, the *prima facie* issue identified may require that this court also determines whether or not the Respondents own the land on which execution was carried out. That said, I, therefore, refrain from saying more on the ultimate issues to be canvassed by the parties at the trial.

Regarding the parties, whereas the present Respondents were not parties, and it is being contended by the Applicant that the decision against Ms. Angee bound them, I am afraid there is so far nothing to suggest that they are bound by that decree. First, the defence filed by Ms. Angee is not known to this court. This Court is thus unable to establish whether or not Ms. Angee made a defence or ought to have made one, and in a manner that would represent the interests of the present Respondents, if at all. Her ground of defence is not known. In the absence of the relevant material before this court, the question regarding the Respondents' land ownership cannot be viewed from the lens normally used for matters said to be *'directly and substantially in issue in an earlier suit'*. It is thus

premature and inconceivable to suggest that the suit against Ms. Angee sealed the Respondents' fate.

I further note the Applicant's arguments that, the Respondents ought to have sought review, if at all they were aggrieved with the decree of the Magistrate Grade 1. With respect, that submission is not relevant for the purposes of the plea at issue. In any case, a Magistrate Grade 1 does not have powers exercisable by Judge of the High Court under section 82 of the CPA and Order 46 of the CPR.

In conclusion, I find the plea of res judicata not proved. In ***Mansukhlal Ramji Karia & another Vs. Attorney General, Civil Appeal No. 20 of 2002, Tsekooko, JSC***, guided as follows:

"Here the learned judge relied on only the pleadings and submissions of counsel for both sides and the judgment of the Court of Appeal in Civil Appeal No. 36 of 1996 for the view that the suit land was res judicata. There was no evidence to show any relationship between the appellants and the parties in that appeal. In my opinion, the proper practice normally is that where res judicata is pleaded as a defence, a trial court should, where the issue is contested, try that issue and receive some evidence to establish that the subject matter of the dispute between the parties has been litigated upon between the same parties, or parties through whom they claim."

Standing on the strength of the above guidance, the objection is over-ruled but I will leave the matter open for the parties to adduce some evidence, if the Applicant still feels strongly about the plea, so that the issue is resolved alongside other issues to be framed at the trial. However, given that the Applicant appears to have moved court prematurely which must have subjected the Respondents to costs in defending their positions, I will grant costs of opposing this application to the Respondents.

It is so ordered.

Delivered and dated at Gulu this 18th April, 2024.

George Okello

JUDGE

10:18am

18th April,2024

Attendance

Mr. Komakech Stephen, Counsel for the Respondents.

Respondents in Court.

Applicant in Court.

Applicant's Counsel absent.

Mr. Ochan Stephen, Court Clerk.

George Okello

JUDGE