THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUITS NO. 90 & 91 OF 2001

1. MATCO STORES LTD

2. ABDUL YUSUF

3. RAINBOW RANCHERS LTD ..... APPLICANTS

VERSUS

1. **GRACE MUHWEZI**
2. **TABARUKA BANNET .....RESPONDENTS**

Hon. Lady Justice Monica K. Mugenyi

RULING

The respondents separately instituted civil suits No. 90 & 91 of 2001 against the applicants for trespass to land, as well as wrongful seizure, detention and conversion of cows found on the said land. The alleged trespass to land was pursuant to the execution of a judgment decree in respect of an earlier matter, civil suit No. 933 of 1993. It was the respondents' contention that they were never party to the said suit. On 7th April 2009 the 2 suits were consolidated by consent of all parties before my sister judge, Magezi J. At the hearing of the consolidated suit counsel for the 3rd applicant raised 2 preliminary points of law, first, that the consolidated suit was incompetent as it was premised upon a decree by a court of concurrent jurisdiction as this court and, secondly, that the present suit was barred by the doctrine of *res judicata*.

With regard to the first preliminary objection it was the contention of the 3rd defendant/ applicant that vide miscellaneous application No. 447/2001, which in turn arose from civil suit No. 933/93, Byamugisha J. (as she then was) granted orders by which the 3rd defendant could transfer ownership of the suit property to itself. Learned counsel argued that since that miscellaneous application was heard *inter parte*, the issue of ownership of the suit premises had been resolved. Further, that the remedy at the time available to the plaintiffs/ respondents was an application for review of the court's decision or commencement of objector proceedings under Order 22 rules 55, 56 and 57 of the Civil Procedure Rules (CPR), but these options were never explored.

On the second objection Mr. Kanduho for the applicant/ 3rd respondent argued that in so far as the matters under consideration in the present suit had been previously determined by Magezi J. in miscellaneous application No. 38 of 2009, the present suit was *res judicata* within the precincts of section 7 of the Civil Procedure Act (CPA) and should not be entertained. Learned counsel argued that the miscellaneous application in reference considered the impropriety of the present suit (among others) to seek to oust his client's proprietary interest over the suit property and the honourable judge had decisively pronounced herself on that issue. It was counsel's contention that the miscellaneous application was a suit within the meaning ascribed to the term in section 2 of the CPA.

Mr. Geoffrey Kavuma, counsel for the 1st and 2nd defendants, did not address this court on the objections raised but associated himself with Mr. Kanduho's submissions.

On his part, Mr. Mwebembezi for the respondents/ plaintiffs contended that the objections raised by opposite counsel were misconceived and intended to delay the hearing of the substantive suit. Counsel gave a brief background to the present suit, which raised the following salient issues:

1. The complaint in the present suit arose from the erroneous inclusion of the 1st plaintiff's property in the warrant issued by the court in execution of civil suit 933 of 1993, as well as the wrongful sale of the 2nd plaintiff's then un-registered land under a warrant dated 2nd May 2000, yet the said property was not mentioned therein.
2. The 1st plaintiff's registered land was sold and transferred to the 3rd defendant/ applicant yet he was not a judgment debtor in civil suit 933 of 1993.
3. The Registrar, High Court and the Commissioner Land Registration declined to enforce the execution in respect of the 1st plaintiff's land on that basis. The 3rd defendant's lawyers were copied in on the Commissioner's letter.
4. The 3rd defendant fraudulently and secretly filed miscellaneous application No. 447 of 2001 arising from civil suit 933 of 1993 in the commercial court; the 1st plaintiff was not party thereto, the respondents therein being the Chief Registrar of titles and an auctioneer; the ownership of the present suit land was never adjudicated in that application – the respondents therein were merely ordered to carry out stated duties, and the application proceeded ex parte.
5. At the time of filing the application the 3rd defendant had already filed its written statement of defence in civil suit 90 of 2001, one of the cases consolidated into the present suit.
6. Vide miscellaneous application 668 of 2001 the plaintiffs/ respondents sought to have the order arising from miscellaneous application 447 of 2001 reviewed but the presiding judge (Byamugisha J.) had been elevated to the Court of Appeal and Okumu Wengi J. before whom the application was placed declined to hear it.

On the basis of the foregoing background, Mr. Mwebembezi argued that the present suit was not *res judicata* as the plaintiffs had never been party to any proceedings on the question of ownership of the suit land. He reiterated this position on the issue of concurrent jurisdiction,

arguing that whatever was decided by the 2 judges in reference pertained to miscellaneous applications that did not conclusively address the ownership question. With specific regard to miscellaneous application 38 of 2009, counsel contended that the matter for adjudication therein was the discharge of an interim injunction, and the honourable judge was very well aware that civil suit 91 of 2001 – also a component of the present consolidated suit – was still pending hearing.

In a brief reply Mr. Kanduho pointed out that learned respondent counsel had not addressed an order by Byamugisha J. emanating from miscellaneous application No. 447 of 2001. On the question of the allegedly fraudulent filing of the same application, counsel contended that once a sale was ordered by court such sale remained valid until the underlying order was set aside. He further argued that such sale could not be impeached by correspondence from a registrar or commissioner land registration, failure by the respondents to institute objector proceedings could not be remedied by the present suit. Counsel reiterated his earlier prayer that this court did not have residual powers to sit in judgment and determine the legality of a court of concurrent jurisdiction.

I propose to consider the objection premised on *res judicata* prior to a determination of the issue of concurrent jurisdiction.

The doctrine of *res judicata* is set out in section 7 of the CPA as follows:

> "**No court shall try any suit 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 finally decided by that court.**"

That provision outlines the following parameters that must be satisfied for the doctrine of *res judicata* to be applicable to a matter:

1. The existence of a former suit that has been finally decided by a competent court.
2. The parties in the former suit should have been the same as those in the latter suit, or parties from whom the parties in the latter suit, or any of them, claim or derive interest.
3. The parties in the latter suit should be litigating under the same title as those in the former suit.
4. The matter in dispute in the former suit should also be directly and substantially in dispute in the latter suit where *res judicata* has been raised as a bar.

See also **Karia & Another vs. Attorney General & Others (2005) 1 EA 83 at 93** (Supreme Court, Uganda) and **Lotta vs. Tanaki & Others (2003) 2 EA 556 at 557** (Court of Appeal, Tanzania).

In the present case there does exist a former suit (civil suit No. 933 of 1993) that was conclusively decided and does have a bearing on the present suit. It is from this suit that miscellaneous application 447 of 2001 arises. Conversely, miscellaneous application No. 38 of 2009 that was referred to by counsel for the applicant/ 3rd defendant arose from a different suit – civil suit No. 4 of 2009. This court was not addressed by either party to the present application as to whether or not that suit was conclusively decided in the High Court. This court cannot assume that it was. It is, therefore, not under consideration in the present application. Consequently, it would appear that the only concluded substantive suit under consideration presently for purposes of the bar of *res judicata* would be civil suit No. 933 of 1993.

It was Mr. Kanduho's contention that miscellaneous application No. 38 of 2009 was a suit within the meaning ascribed to the term in section 2 of the CPA. For ease of reference section 2(x) is reproduced below:

> **"'suit' means all civil proceedings commenced in any manner prescribed."**

Section 2(q) defines the term 'prescribed' as 'prescribed by rules', while the term 'rules' is defined in section 2(t) of the same Act as 'rules and forms made by the rules committee to regulate the procedure of courts.'

The case of **Mityana Ginners Ltd vs. Public Health Officer, Kampala (1958) 1 EA 339 *at 341*** (East Africa Court of Appeal) posits a meaning to the term 'suit' as defined in section 2 of the CPA. In that case the appellants had lodged an 'appeal' against a notice or directive issued upon them by a public health officer in the trial court by way of 'Notice of Motion Chamber Summons'. The operative words in that 'appeal' were '*Let all parties concerned attend the judge ... when the court will be moved on the hearing of an application ... that this Honourable Court be pleased to set aside the notice ....*' In his judgment Briggs VP, citing **Mansion House Ltd vs. Wilkinson (1954) 21 EACA 98 at 101, 102**, re-stated the definition of the term 'suit' within the precincts of then section 2 of the Civil Procedure Ordinance, which is identical to section 2(x) of the CPA as is, as follows:

> "**Accordingly a 'suit' is any civil proceeding commenced in any manner prescribed by rules and forms made by the Rules Committee to regulate the procedure of courts. ... I consider that 'suit' must for the purposes of these proceedings have its precise and statutorily defined meaning.**"

For purposes of procedure in the High Court of Uganda, as is the case presently, it does appear quite clear to me that the applicable rules of procedure would be the Civil Procedure Rules, SI 71-1. Order 4 rule 1(1) of the CPR explicitly states that '**every suit shall be instituted by presenting a plaint to the court or such officer as it appoints for that purpose**.'

It would appear from the foregoing rule that the suit envisaged by section 2 of the CPA is a substantive suit as opposed to miscellaneous applications, as is the case presently. Indeed in

Mityana Ginners Ltd vs. Public Health Officer, Kampala (1958) 1 EA 339 *at 342* the honourable judge drew a distinction between decrees and orders of courts in so far as they relate to the definition of a suit, and held:

> **"It seems clear that, whereas decrees arise only in suits, orders may arise in proceedings which are not suits, to which class of proceedings I have referred to above. If therefore, as I believe, the application to the Supreme Court was not a 'suit', it could not result in a decree, but only in an order."** *(emphasis mine)*

Bringing the *ratio decidendi* in **Mityana Ginners Ltd vs. Public Health Officer, Kampala** (supra) home to the application before me, clearly the orders of Magezi J. in miscellaneous application No. 38 of 2009 arose from civil proceedings that do not constitute a suit. As quite rightly argued by Mr. Mwebembezi, the proceedings from which those orders accrued were an application for the discharge of a temporary injunction. I do not consider such application to be a suit for purposes of the bar of *res judicata*. Applications for interim injunctions generally arise from substantive suits; are interlocutory in form and substance, and do not present final decisions with regard to matters in issue in the substantive suit. It, therefore, would defeat logic for section 7 of the CPA to include such interlocutory matters within its bar of *res judicata*. Although matters to do with the underlying land ownership issues were touched upon in the ruling in miscellaneous application No. 38 of 2009 albeit without hearing the suit on its merits, this would not, in my view, render those interlocutory proceedings a civil proceeding within the meaning of Order 4 rule 1(1) of the CPR or attribute finality to the resultant decision as envisaged under section 7 of the CPA. In my judgment, therefore, the only suit on the record in respect of which the bar of *res judicata* may be considered is civil suit No. 933 of 1993.

It is to this suit that I now revert. The facts of the present case as this court understood them are that the defendants in civil suit 933 of 1993 (hereinafter referred to as 'the former suit') defaulted on their obligations to supply the plaintiffs with buses as per contractual obligations. Judgment was entered in favour of the plaintiffs whereupon execution of the judgment decree ensued. The dispute before this court arose from the allegedly wrongful attachment of the present plaintiffs' land in execution of that judgment decree. Upon failure by the judgment debtors in the former suit to pay the decretal amounts therein recourse was made to the property in contention in the present suit to realise the said decretal sum. Neither of the plaintiffs in the present suit were judgment debtors in the former suit. The judgment debtors therein were a one James Mbabazi and Kinkizi Bus Services Ltd, who are the plaintiffs' father and his (the father's) company respectively. The only link between the present plaintiffs' properties and the judgment debtors in the former suit is the fact that the present plaintiffs were given the said properties by their father, a party to the former suit. The present plaintiffs, therefore, contend that recourse was wrongfully made to their properties in execution.

I shall state from the onset that clearly the cause of action in the former suit was breach of contract arising from a trade transaction between the parties, while that in the latter suit is

trespass to land and conversion arising from execution matters. Consequently, the matters in dispute in either case cannot be deemed to be directly or substantially the same. It is, therefore, apparent on the face of the record that the bar of *res judicata* is inapplicable to the present case in that regard.

It is also quite clear that the parties in the former suit were different from those in the consolidated suit before this court – civil suits 90 & 91 of 2001. The question, then, would be whether or not the present plaintiffs/ respondents claim or derive interest from the plaintiffs in the former case, or are litigating under the same title as those in the former suit so as to bring this case within the defence of *res judicata*.

In my view, reference in section 7 of the CPA to a party in a latter suit claiming interest from a party in a former suit denotes the question of a latter party acquiring the former party's reversionary interest in say property; while reference to a latter party litigating under the same title as the former party connotes successors in title, persons sued in representative capacity or persons holding property in trust for a former litigant. The question as to the circumstances under which the present plaintiffs/ respondents came into ownership of the disputed properties is arguably a question of evidence. No such evidence has been adduced at this stage of the suit as would sufficiently support a finding on this issue either way. In **Karia & Another vs. Attorney General & Others (2005) 1 EA 83 at 95** where the Supreme Court was similarly faced with matters that could have been properly investigated during a full trial, Tsekooko JSC held:

> **"Here the learned trial judge relied on the pleadings and submissions of counsel for both sides ... for his view that the suit 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 by the same parties, or parties through whom they claim."**

It is not in dispute that the bar of *res judicata* is contested in the matter before this court. The circumstances underlying the present plaintiffs' title in the present suit land viz one of the judgment debtors in the former suit cannot be deduced from the face of the pleadings only. It is my view that where pleadings and submission of counsel are insufficient for a conclusive finding on the bar of *res judicata* the justice of the matter dictates that a trial court does hear evidence on the issue by full trial. I therefore hold that the preliminary objection premised on *res judicata* is premature in so far as it cannot be conclusively addressed at this stage of the proceedings.

I now revert to the issue of concurrent jurisdiction. As stated earlier above, it was argued for the 3rd defendant/ applicant that the orders granted by the High Court under miscellaneous application No. 447/2001, which in turn arose from civil suit No. 933/93, mandated the 3rd defendant to transfer ownership of the suit property to itself; since that miscellaneous application

was heard *inter parte*, the issue of ownership of the suit premises had been resolved, and finally, that the remedy at the time available to the plaintiffs/ respondents was an application for review of the court's decision or commencement of objector proceedings under Order 22 rules 55, 56 and 57 of the Civil Procedure Rules (CPR), which options were never explored.

This court has had occasion to peruse the order in respect of the miscellaneous application in reference. As rightly observed by learned respondent counsel, his clients were not party thereto therefore they could not have been present at the hearing of the application as insinuated by Mr. Kanduho. Further, from a reading of the order emanating therefrom there is nothing to indicate that the ownership of the suit land was adjudicated in that application. A letter from the then Registrar High Court, Lawrence Gidudu, dated 8th February 2001, as well as another from the then Commissioner, Land Registration, Jonathan Tibisasa, dated 15th February 2001 do shed light on the background to miscellaneous application No. 447 of 2001. The thrust of both letters is that some of the properties identified by the judgment creditor – the present applicant/ 3rd defendant – for attachment in execution did not belong to the judgment debtor. Property described as Plot 1 Block 73 was explicitly stated to belong to the 1st plaintiff/ respondent herein. It is, therefore, mind boggling that the judgment debtor then went ahead and filed the miscellaneous application under reference seeking the transfer of the property of the 1st plaintiff/ respondent herein to himself in alleged execution. It is even more perturbing that the 2nd defendant's land was similarly sold and yet it was never listed among the properties for attachment in execution.

Be that as it may, quite clearly the ownership of the suit premises has never been adjudicated on its merits by the High Court. It does follow, therefore, that the question of concurrent jurisdiction does not arise and this court's unlimited original jurisdiction as conferred by article 139 of the Constitution is in no way fettered by the final determination of civil suit No. 933 of 1993.

I do therefore over-rule the preliminary objections raised by the applicant/ 3rd defendant with costs to the respondents. I hereby order that the substantive suit proceed to be heard on its merits. I so order.

Monica K. Mugenyi
JUDGE

18th September, 2013