**THE REPUBLIC OF UGANDA**
**IN THE HIGH COURT OF UGANDA**
**HOLDEN AT MBALE**

**HCT-04-CV-CR-0001-2013**
**(ORIGINAL PALLISA CIVIL SUIT NO. 26/2005)**

**TAITANKOKO DAUSON :::::::::::::::::::::::::::: APPLICANT**

**VERSUS**

1. **ISAH MALE**
2. **KIDIMU HAMUZATA :::::::::::::::::::::::::::: RESPONDENTS**

**BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA**

**RULING**

This is an application by Notice of Motion brought under S.83 of the Civil Procedure Act, O.52 r.1 and 3 of the Civil Procedure Rules on grounds inter alia that;

(a) The lower court exercised jurisdiction not vested in it by law by entertaining a matter that is *res-judicata* by virtue of the earlier decision in Budaka Civil Suit MT.96/96.

(b) That it is just and equitable to grant this application.

The application is supported by the affidavit of **Taitankoko Dauson** who deponed to the fact that he brought documents (annex 'D') to prove that the matter was *res judicata* (paragraph 6) and that the trial Magistrate rejected the documents as irrelevant without giving reasons (paragraph 7).

He prayed for revision for the above reasons.

In reply the respondent **Issa Male** deponed under his affidavit, paragraph (4), paragraph (5), paragraph (6), paragraph (7), effectively stating that appellants failed to prove *res-judicata*. He further stated under paragraph 11, that revision would cause him serious hardships.

Both counsel for applicant and respondent addressed this court on this application.

Section 83 of the Civil Procedure Act under which the jurisdiction of this court in revision is premised states that;

> "*Court will revise a decision where the lower court:*
>
> 1. *Exercises jurisdiction not vested in it.*
> 2. *Fails to exercise jurisdiction vested in it.*
> 3. *Exercises jurisdiction illegally or with material irregularity*."

The provision of the law regarding *res judicata* is stated in section 7 of the Civil Procedure Act which provides that;

> "*No court shall try any suit or issue in which matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties…… in a court competent to try such subsequent suit in which such issue has been subsequently raised*."

See *Semakula v. Susane Magala and 2 Others (1979) HCB*

Once this plea is successfully raised the suit must be dismissed.

The question for this court to examine here I s whether the plea of *res judicata* was successfully raised as stated by the applicant.

An examination of the lower court record shows that when the matter was called for trial in the land tribunal on 19th December 2005, the applicant raised the plea of *res judicata*. The applicant was then ordered by the tribunal to;

> "*Supply to the tribunal and the claimants the proceedings and judgment as claimed by him, failure to do so within one month from this date, the claim will proceed for hearing on 10th June 2006.*"

According to the applicant in his affidavit in rejoinder under paragraph (3), and paragraph (4) of his affidavit in support, he states that the applicant failed to produce in court the certified copies of proceedings and judgment in the former suit. He however presented certain documents related to the case file, which he attached to his affidavit as annex "A" (letter from Chief Magistrate Tororo to G.2 Budaka for CS.96/66, 'B' (not clear), 'C' Mortgage agreement, 'D' letter from Chief Magistrate to G.2.

Addressing the above, the applicant claims that court did not exercise its jurisdiction to determine actually whether the matter was *res judicata* or not. He claimed that the Magistrate merely stated that the documents are irrelevant and no reasons were given. His contention is that from the evidence, the action of the Magistrate was with material irregularity and led to grave injustice; and ought to be revised.

**Mutembuli** for Respondents pointed out that the law places the burden of proof on he who alleges or wants to prove a fact; as in *Miller v. Commissioner for Pensions 1997 ALL ER 374*: Also **Section 1001-103 of the Evidence Act**. The applicant therefore had the burden to prove existence of *res judicata*.

He points out that applicants failed to prove and produce or supply proceedings and judgment referred to in the pleadings ordered by the tribunal.

It is my view that this court has the duty to examine the lower court under its revisionary power, to check if the trial Magistrate failed to exercise jurisdiction vested in him, or acted illegally or with material irregularity.

I find that from paragraph 4 of the written statement of defence, applicants pleaded that the suit had been handled by the Chief Magistrate Tororo and decided in their favour and boundary marks planted by G.2 Budaka.

During the trial the applicant was given chance to prove that the alleged civil suit existed before the court in Budaka. The Land Tribunal gave him one month. Before he did so, the matter proceeded before the Magistrate court on transfer before **His Worship Ismail Zinsanze**. At page 10 of the proceedings the Magistrate looked at documents referred to by applicant and found them irrelevant to the case. He went ahead to hear the matter.

Was this behavior offensive so as to be correctable by revision under section 83 of the Civil Procedure Act? Did the learned trial Magistrate act irregularly in refusing to consider the said documents as proof of *res judicata*?

In my view the learned trial Magistrate acted properly and the refusal to refer to the documents as relevant was a decision reached on the evidence before him. The law is that the party alleging *res judicata* must specifically plead and prove it in court. It is not merely alluded to or inferred from a court document. It must be proved at filing of the suit (plaint) by annexing to the plaint the judgment, orders and proceedings of the civil suit referred to as a bar to further trial. *H. Ochanya vs. Peter Ogwang (1976) HCB 331* which held thus;

> "*If a party claims that the suit was res judicata and the other party denies it and there was no record of the earlier case before the trial court, it would be reasonable and proper for the trial court to rule that the claim of res judicata had not been proved to the satisfaction of the court, and would order that the trial proceeds*."

Also *Gokladas Laximidas Tanna v. S.R. Rose Muyinza HCC.707/87* held that;

> "*Res judicata can only apply to a person where judgment has been given*."

The above cases show that the court is guided in its decision by the proceedings and judgment of the lower court. These were not the documents provided to the trial Magistrate. Annex "A" was a letter, Annex "B" was also a letter, annex "C" was a letter. The contents of these annexes when examined are not a reference to the applicant and respondents. They refer to other parties. Annex 'A' refers to *CS.96/66- Mweri S/o Kisala v. Kasiki Suuku*, Annex 'B' is a blank unreadable sheet, annex 'C' a list of names, and annex 'D' refers to *Mweru S/o Kisale vs. Kasani Suuki*. These documents were referred to in the evidence of DW.1 trying to explain that his father and respondent's father at one time litigated over the same

land. He was silent on their contents, the parties etc. The learned trial Magistrate considered the evidential value of the said documents and found them irrelevant. He did so judiciously.

If his decision was wrong then the applicant's recourse as (he rightly stated in his submissions) is not in revision but in appeal. *I Kasinyu Douglas v. Bwambale Yusuf HCC/2011* quoted by applicant actually supports the above view. Whether the learned trial Magistrate was right or wrong to hold as he did, was a question for determination on appeal. I do not find any irregularity, or failure on the part of the learned trial Magistrate, that warrants a revision.

I will also agree with respondents that litigation ought to be brought to an end. This is an old disputes which has spent long in court.

Under the law, the court cannot exercise its revisional power where there was lapse of time or other cause, (applicant went on appeal and failed) where the exercise of such power would involve serious hardship to any person. In *H. Ochaya v. Peter Ogwang (1976) HCB 331*, it was observed that if the law allowed cases to be resurrected after the passage of time on the grounds that the matter had not been properly heard then there would be no end to such claims.

There is no merit in this application, and for reasons above it is hereby dismissed with costs to respondents.

**Henry I. Kawesa**
**JUDGE**
**11.11.2014**